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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 184.

THE TOLEDO, DELPHOS & BURLINGTON RAILROAD COMPANY; THE TOLEDO, CINCINNATI & ST. LOUIS RAILROAD; JAMES M. QUIGLEY, CHARLES T. HARBECK, AND JOHN McNAB, APPELLANTS,

vs.

THOMAS H. HAMILTON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED OCTOBER 15, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 19, 1889.

and a citizen of the State of Ohio; and Grenville D. Braman, a citizen of Massachusetts; and thereupon your orator complains and says:

I. That on the 17th day of January, 1880, the Toledo, Delphos and Burlington Railroad Company, a corporation created by and existing under the laws of the States of Ohio and Indiana, formed by the consolidation of certain corporations known as the Toledo and Maumee Narrow Gauge Railroad Company, the Toledo, Delphos and Indianapolis Railway Company, the Delphos and Kokomo Railway Company, and the Delphos, Bluffton and Frankfort Railroad Company, was engaged in the construction and equipment of the line of railroad from Toledo, Ohio, to Kokomo, Indiana, hereinafter more particularly described; and on said last-mentioned day, by its president and secretary, under its corporate seal, and in pursuance of a resolution to that end duly adopted by the board of directors of said corporation on the 12th day of December, 1879, which resolution was thereafter and before the execution of the bonds and deed of trust or mortgage hereinafter mentioned duly ratified by the vote of a majority of the stockholders of said corporation at a meeting duly convened and held on the 17th day of January, 1880, said Toledo, Delphos and Burlington Railroad Company did execute its one thousand two hundred and fifty bonds for the sum of $1,000 each, dated the 1st day of January, 1880, payable on the 1st day of January, 1910, bearing six per cent. interest per annum, payable semi-annually on the first days of January and July in each and every year, at the city of New York, each having interest warrants or coupons for thirty dollars each thereto attached for payment of the interest as aforesaid; and the said Toledo, Delphos and Burlington Railroad Company issued and sold one thousand two hundred and fifty of said bonds, with said interest warrants or
3 coupons attached, all of which said bonds were, before the same were issued, duly certified by your orator, and said bonds are now in the hands of divers and sundry persons as holders thereof; and with the proceeds of sale of said bonds the said corporation proceeded to construct, equip, maintain, and operate said railway.

II. Your orator further shows that, in order to secure the payment of the principal and interest of said issue of bonds, the said Toledo, Delphos and Burlington Railroad Company did on said 17th day of January, 1880, in pursuance of the further provision of said resolution, execute and deliver unto your orator, a corporation created by and existing under the laws of the State of New York and a citizen of said last-mentioned State, a certain deed or indenture of trust and mortgage, which was duly recorded in the counties of Lucas and Henry, Ohio, on January 21, 1880; in the counties of Wood and Putnam, Ohio, on January 22, 1880; in the counties of Allen and Van Wert, Ohio, on January 23, 1880; in the counties of Adams and Wells, Indiana, on January 24, 1880; in the counties of Huntington and Wabash, Indiana, on January 26, 1880; in the counties of Grant and Howard, Indiana, on January 27, 1880, and in the county of Miami, Indiana, on January 28, 1880; and thereby it did bargain, sell, grant, convey, and confirm unto your orator and

its successor or successors in trust all and singular the line of railroad of the said Toledo, Delphos and Burlington Railroad Company, as the same then was or should thereafter be constructed between Toledo, Lucas county, Ohio, through the counties of Lucas, Wood, Henry, Putnam, Allen, and Van Wert, in the State of Ohio, and the counties of Adams, Wells, Huntington, Wabash, Miami, Grant, and Howard, in the State of Indiana (and not including the branch line from Delphos, Allen county, Ohio; thence via Spencerville, Mendon, and Mercer, and through the counties of Allen, Van Wert, and Mercer to Shanesville, Mercer county, Ohio), being about one hundred and eighty miles in length, together with all and singular the rights of way, road-bed, made or to be made; its track, laid or to be laid, between the terminal points aforesaid, to-
4 gether with all the stations, depot grounds, rails, fences, bridges, sidings, engine-houses, machine shops, buildings, erections in any way then appertaining or which should thereafter appertain unto said described line of railroads, together with all the engines, cars, machinery, supplies, tools, and fixtures which were then or should be at any time thereafter held, owned, or acquired by the said railroad company for use in connection with the line of railroad aforesaid and all its depot grounds, yards, sidings, turnouts, sheds, machine shops, leasehold rights, and other terminal facilities, together with all and singular the powers and franchises thereto belonging and the tolls, income, and revenue to be levied and derived therefrom; to have and to hold the said granted premises unto your orator and its successors forever in trust, nevertheless, and for the uses and purposes expressed in said deed of trust or mortgage, which will more fully and at large appear by reference to the original thereof, and your orator craves leave to produce and refer to said original on the hearing of this cause.

III. Your orator further shows that in and by said mortgage or deed of trust to your orator it was, among other things, provided and the said Toledo, Delphos and Burlington Railroad Company did therein covenant and agree that if the interest due on any of said bonds should not be paid by the said last-mentioned railroad company when the same should become due and should remain in arrears for six months after it had been actually demanded at the place where the same was payable, as specified in said coupons, or in case the principal of said bonds or any of them should not be paid at their maturity, then it should be lawful for your orator or its successors to forthwith demand, enter, take, and maintain possession of all and singular the railroad premises and franchises thereby conveyed, and as the attorney-in-fact or agent of said last-mentioned railroad company, by itself and agents or substitutes duly constituted, have, use, manage, operate, and enjoy the same and each and every part thereof to as full an extent as the said
5 railroad company might lawfully do, and should make, from time to time, all needful repairs, alterations, and additions thereto and receive all the tolls, income, and revenue thereof, and, after deducting the expense of such use, operation, reasonable repairs, alterations, and additions and the cost and charges of taking

such possession and a fair compensation for the services of such trustee for such taking possession and management while in possession, your orator or its successor for the time being should apply the remaining income and revenue arising from the use of said mortgaged property and coming to its hand to the payment of interest in default and maturing from time to time, satisfying the said coupons, in the order of their several maturities, and thereafter apply the residue upon the principal of said then outstanding bonds.

And your orator further shows that it was also provided in said mortgage or deed of trust that if a six-months' default should occur either in payment of principal or interest of any of the bonds thereby secured, after such actual demand as aforesaid, then it should be lawful for your orator or said trustee for the time being, with or without entry as aforesaid, to cause all and singular the said premises, railway and appurtenances, equipments and franchises, thereby conveyed to be sold as an entirety, at public auction, to the highest and best bidder, at the city of Kokomo, Indiana, after giving at least sixty days' notice of the time, place, and terms of sale by advertisement in a newspaper of general circulation in the city of Kokomo and like advertisement in a newspaper of general circulation in the city of New York, and on such sale your orator or the trustee for the time being should make, execute, acknowledge, and deliver unto the purchaser or purchasers thereof a good and sufficient deed in fee simple conveying the said railroad property and franchises so sold, which conveyance should be a perpetual bar in law and equity against said last-mentioned railroad company, its successors and assigns, and all persons claiming or to claim under them, of all right, title, interest, or claim of, in, or to the said premises and franchises or any part thereof; and that your orator, after deducting from the pro-
6 ceeds of sale the costs and expenses thereof and a reasonable compensation to said trustee and its attorneys and agents for services in connection therewith, should apply so much of the proceeds as might be necessary to the ratable payment of principal and the then accrued interest of all the said bonds, whether the said principal should then be due or not, and if any proceeds of such sale should remain in its hands after the full payment of the principal and accrued interest of all said bonds then it should render and pay over the same to the said last-mentioned railroad company or its successors or assigns.

And your orator further shows that it was provided in said mortgage or deed of trust and the said last-mentioned railroad company did therein and thereby expressly covenant and agree that it would, in case of default in the payment by it either of the principal or interest of any of its bonds thereby secured, forthwith, upon demand of your orator or of the trustee for the time being, surrender the full and peaceable possession of all and singular the premises thereby conveyed or intended to be, including all the real and personal property by it acquired subsequent to the date of the said mortgage for use in connection with the said line of railroad between said points, and would also surrender all books of accounts, records, and papers used by it in and about the operation thereof.

VI. Your orator further shows that the said last-mentioned railroad company, The Toledo, Delphos and Burlington Railroad Company, has failed to pay the interest on said bonds and has made default therein to all the holders thereof, and said company has failed to pay the interest warrants or coupons due thereon January 1, 1883, and July 1, 1883, and the same have ever since remained unpaid, although payment of the same was duly demanded, and that said default has continued and said interest has remained in arrears for more than six months, and many of the holders of said bonds to whom such default has been made have required your orator to institute the necessary legal proceedings to foreclose said mort-
7 gage and sell the said mortgaged railway and property of the Toledo, Delphos and Burlington Railroad Company, known as the Main Line of the Toledo, Delphos and Burlington Railroad Company, and for the appointment of a receiver of said property, and to take such other and further steps necessary and proper for the protection of the rights of the holders of said bonds as your orator may be authorized to take by said deed of trust or mortgage; and your orator deems it for the interest of the parties concerned, particularly of the holders of the said first-mortgage bonds and coupons, to institute judicial proceedings for the foreclosure of said mortgage or deed of trust and for the sale of all the premises and property thereby conveyed, and for the appointment of a receiver to take possession of, operate, and control the said railroad and its branches, and to take an inventory of all the personal or movable property included in said mortgage, and to keep an account of the earnings and expenses incurred in operating the said railroad and branches.

And your orator further shows that the said Toledo, Delphos, and Burlington Railroad Company, proper corporate action for that purpose having first been had, did, on the 17th day of January, 1880, deliver to your orator, as trustee, a certain other deed of trust or mortgage, bearing date on that day, whereby it granted, bargained, sold, and conveyed to your orator, as trustee, all the railroad, property, rights, franchises, goods, and chattels described or mentioned in the mortgage first set forth in this bill, then owned or thereafter to be acquired, to secure the payment at maturity of the principal of one thousand two hundred and fifty bonds of the said Toledo, Delphos and Burlington Railroad Company, known as income bonds, for one thousand dollars each, numbered from 1 to 1,250, inclusive, payable on the 1st day of January, 1910, and of such interest thereupon as might become due thereon, according to the tenor of said last-mentioned bonds and mortgage; that it was by said last-mentioned indenture expressly agreed that interest upon said bonds was not to be due or payable except out of net earnings of said railroad company applicable to such purpose, and
8 when the amount should have been ascertained and declared by the board of directors of said last-mentioned company, whose duty it was, by the terms of said indenture, in each year during the currency of said bonds, beginning with the year 1881, in the month of January, to declare what amount, if any, of net earn-

ings had been made during the preceding fiscal year, which was justly applicable to the payment of interest on said income bonds; and such ascertainment of net earnings was to be made by deducting from gross income all operating expenditures, including rebates, taxes, insurance, liabilities for interest on the existing first-mortgage bonds of the said railroad company, and other payments, as by reference to said income mortgage will more fully and at large appear.

That the said last-mentioned mortgage was duly recorded in each of the counties in which the said first mortgage was recorded, so as to constitute a second lien or mortgage upon the railroad and property thereby conveyed.

Your orator further shows, on information and belief, that twelve hundred and fifty of said bonds so secured as aforesaid by said second or income mortgage have been issued and disposed of by said Toledo, Delphos and Burlington Railroad Company, and are now in the hands of divers persons as owners thereof, who are unknown to your orator.

Your orator further shows that no interest has become or is now due and payable on said last-mentioned bonds under the terms thereof, and of said second mortgage, owing to insufficiency of earnings; but that the principal of said bonds, issued as aforesaid, is a line upon said property, rights, franchises, etc., of said Toledo, Delphos and Burlington Railroad Company described in said mortgage next after the first mortgage hereinbefore described.

VI. Your orator further shows that in or about the month of February, 1882, a certain corporation known as the Toledo, Cincinnati and St. Louis Railroad Company (of Indiana and Illinois), claiming to be a corporation of the said States of Indiana and
9 Illinois, by virtue of certain consolidations, and a certain other corporation known as the Frankfort, St. Louis and Toledo Railroad Company, claiming to be a corporation of the State of Indiana, and the defendant, The Toledo, Delphos and Burlington Railroad Company, entered into an agreement with each other, whereby said several corporations undertook, under the name of the Toledo, Cincinnati and St. Louis Railroad Company, to consolidate and unite all the lines of railroad of the Toledo, Delphos and Burlington Railroad Company (including said Main Line Division) with the lines of railroad of the Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois, and of the Frankfort, St. Louis and Toledo Railroad Company, at their respective points of connection, and to consolidate the capital stock of the said respective companies, under the laws of Ohio, Indiana, and Illinois, and to transfer and vest in said consolidated company, under the name of the Toledo, Cincinnati and St. Louis Railroad Company, all the powers, privileges, immunities, and property, real, personal, and mixed, belonging to the respective companies, parties to said agreement of consolidation.

And your orator further shows that the said company, formed by said last-mentioned consolidation and known as the Toledo, Cincinnati and St. Louis Railway Company, had or claimed to have the power to and did construct or maintain and operate a railroad

from the city of Toledo, in the State of Ohio, to the town of Delphos, in said State, and thence through the States of Indiana and Illinois, into the city of East St. Louis, in Illinois, including the line of railroad described in the mortgages hereinbefore set forth, and from said town of Delphos to Dayton, Ohio, and also a railroad from Dayton to Wellston, Jackson county, Ohio, and thence to Gallipolis, Gallia county, Ohio, and a branch to a point at or near Ironton, Ohio; and also the railroad formerly of the Iron Railroad Company, in Lawrence county, Ohio, with a branch extending from a point near Shakertown, Ohio, to a point at or near Lebanon, Ohio, to wit, at Dodds, Warren county, Ohio, and a branch from Mercer to Shanesville, Ohio, and that on or about the 5th day of May, 1883, the said Toledo, Cincinnati and St. Louis Railroad Company
10 entered into a further agreement of consolidation with two corporations, organized under the laws of the State of Ohio, known, respectively, as the Cincinnnati Northern Railway Company and the Spring Grove, Avondale and Cincinnati Railway Company, the first-named company owning or being engaged in constructing a railroad from Cincinnati, Ohio, to Waynesville, Warren county, Ohio, and the second-named company being the owner of a line of railroad from a point in Cincinnati to Spring Grove cemetery, Hamilton county, Ohio, which had theretofore been leased to said Cincinnati Northern Railway Company, whereby said three corporations undertook to consolidate and unite all their said lines of railroad, and to consolidate the capital stock of the said respective companies, under the laws of Ohio, and to transfer to and vest in the said new consolidated company, under the name of the Toledo, Cincinnati and St. Louis Railroad Company (the defendant in this bill of complaint), all the powers, privileges, immunities, and property, real, personal, and mixed, belonging to the respective companies, parties to said agreement of consolidation, said consolidated company expressly recognizing and affirming the said several mortgages hereinbefore mentioned and the said bonds and coupons secured thereby, and assuming payment of the same, the capital stock of said new consolidated company to be thirty millions of dollars, of which eleven millions was to be preferred stock and the balance thereof to be common stock.

Your orator further shows that it is informed and believes that said several agreements of consolidation were acted upon by said companies from said respective dates, although your orator says that it was not a party to said consolidations or either of them and has not assented thereto or acquiesced therein.

VII. Your orator further shows that it is claimed by said defendant, The Toledo, Cincinnati and St. Louis Railroad Company, that it owns, by virtue of the said last-mentioned consolidation, all the aforesaid property, rights, franchises, and assets of the said Toledo, Delphos and Burlington Railroad Company mentioned and
11 described in the two several mortgages aforesaid, and that the same have become subject to the debts and liabilities of said consolidated company; but your orator says that whatever rights, if any, in or to the same the said Toledo, Cincinnati and St.

Louis Railroad Company acquired by virtue of said consolidation, the same are subject and subordinate to the several mortgages hereinbefore stated, and that the railroad property, franchises, rights, and assets embraced in and covered by said mortgages are not nor were they at the time of the said last-mentioned consolidation sufficient to pay the amount of all the bonds and interest secured thereon by the several mortgages hereinbefore mentioned.

Your orator further shows that several of the constituent companies forming the said consolidated corporation known as the Toledo, Cincinnati and St. Louis Railroad Company heretofore executed various mortgages on the lines of railway and property owned by them, respectively, to your orator, as trustee, which said mortgages in the aggregate cover, as your orator is informed and believes, substantially all of the property of said defendant, The Toledo, Cincinnati and St. Louis Railroad Company, and that default has been made in the payment of interest on all of the bonds secured thereby except income bonds; and that said mortgages are as follows:

1. First mortgage (terminal trust), Toledo, Delphos and Burlington Railroad Company to Central Trust Company, trustee, dated June 21, 1880, to secure $250,000 of bonds, and covering property in Toledo.

2. First mortgage, Toledo, Delphos and Burlington Railroad Company to Central Trust Company, trustee, dated July 1, 1880, to secure $1,000,000 of bonds, and covering Dayton Division from Delphos to Dayton.

3. First mortgage, Toledo, Delphos and Burlington Railroad Company to Central Trust Company, trustee, dated May 16, 1881, to secure $250,000 of bonds, and covering Cincinnati Division from Shakertown to Lebanon, Ohio.

12 4. First mortgage, Toledo, Cincinnati and St. Louis Railroad Company to Central Trust Company and Thomas A. Hendricks, trustees, dated July 23, 1881, to secure $3,000,000 of bonds, covering line from Kokomo to East St. Louis.

5. First mortgage, Toledo, Delphos and Burlington Railroad Company to Central Trust Company, trustee, dated May 16, 1881, to secure $2,250,000 of bonds, and covering Southeastern Division from Dayton to point at or near Ironton.

6. First mortgage, Iron Railroad Company to Central Trust Company, trustee, dated August 1, 1881, to secure $500,000 of bonds, and covering lines in Lawrence county, Ohio.

7. First mortgage, Cincinnati Northern Railway Company to Central Trust Company, trustee, dated October 1, 1880, to secure $1,000,000 of bonds, and covering line from Waynesville to Cincinnati.

8. First mortgage, Spring Grove, Avondale and Cincinnati Railway Company to Central Trust Company, trustee, dated May 25, 1881, to secure $1,000,000 of bonds, and covering line from Cincinnati to Spring Grove cemetery.

9. The mortgage particularly described in the second paragraph of this bill.

Your orator further shows that there are also other mortgages

held by your orator, as trustee, and made by said several constituent railroad companies other than said Spring Grove, Avondale and Cincinnati Railway Company to secure income bonds which are junior to the several first mortgages hereinbefore recited and which are liens upon said divisions, respectively, except that embraced in and covered by said terminal trust mortgage.

That your orator has commenced or is about to commence in courts of competent jurisdiction proper legal proceedings or
13 suits in equity to foreclose the said several mortgage liens and to procure the appointment of a receiver of each of said separate lines covered by said respective mortgages; and that your orator is advised and believes that it will be for the interest of all the parties concerned, and especially of the several holders of the bonds and coupons secured by said several and respective mortgages, that the accounts and affairs of each of the said several lines or divisions should be kept separate from each of the other divisions of said consolidated company, and that some one competent person should be appointed as receiver in each of the several suits or proceedings so as aforesaid commenced or to be commenced by your orator.

Your orator further says that, as it is informed and believes, the net earnings of some or one of the several divisions of the said Toledo, Cincinnati and St. Louis Railroad Company are sufficient, if kept separate, to pay the interest warrants or coupons of the first-mortgage bonds constituting a lien upon such separate division or divisions, but that the said Toledo, Cincinnati and St. Louis Railroad Company claims that the earnings of all the divisions of said road should go into the common fund of said consolidated company, and that no account should be kept of the separate earnings and expenses of each division; and the earnings and income of all of said divisions are now and ever since said last-mentioned consolidation have been received and taken by said consolidated company, the said Toledo, Cincinnati and St. Louis Railroad Company, which is hopelessly insolvent, and appropriated to pay the expenses of said consolidated company, and wholly diverted from the payment of the interest, or any part thereof, due upon the said bonds secured by the several mortgages hereinbefore described and referred to; and your orator further shows that, unless a separate account of the earnings and expenses of each of said divisions be carefully kept and preserved, it will be impossible to ascertain whether any interest shall have become due and payable upon the income bonds hereinbefore mentioned or described.

Wherefore, and forasmuch as your orator is without remedy
14 at law, your orator brings this its bill of complaint in behalf of all the holders of bonds and coupons secured by said mortgage first herein mentioned, and prays that Grenville D. Braman, who claims some interest, and the said Toledo, Delphos and Burlington Railroad Company may be made defendants hereto, and that said consolidated company, The Toledo, Cincinnati and St. Louis Railroad Company, may be made to answer as to its interest; that process of subpœna may issue against each of them, and that they

be required to make answer respectively to all and singular the allegations and charges herein contained; that the said mortgaged property be sold at a judicial sale, free of the claims of all parties hereto, upon such terms and conditions as this honorable court may deem most to the interest of the holders of said first-mortgage bonds and coupons, and that out of the proceeds of said sale the amount of bonds and interest secured by said first mortgage or deed of trust to your orator may be paid to your orator for the holders thereof respectively, and that the balance, if any, of said proceeds of sale may be paid to your orator as trustee for the holders of said bonds and coupons secured by said second mortgage of said Main Line Division, in order of priority; and that meanwhile, and until such sale, a receiver may be appointed of all and singular the premises and property aforesaid embraced within the said mortgage or deed of trust hereinbefore first set forth, and that he may be authorized and empowered to maintain and operate said railroad of said Main Line Division, and to exercise all the powers usually granted to receivers, and to receive and to collect all the rents and other income from any of said mortgaged property, and to preserve the same and all parts of said mortgaged premises and property from waste and loss, and to make such payments and carry out and perform such contracts and agreements as may be to the interest of said several parties interested in said railroad, and for such other and further relief as to the court shall seem to be just and according to equity and good conscience.

BUTLER, STILLMAN & HUBBARD,
HOADLEY, JOHNSON & COLSTON,
Counsel for Central Trust Company of New York.

15 UNITED STATES OF AMERICA,
Southern District of New York, State of New York, } *ss:*
City & County of New York,

Henry F. Spaulding, being duly sworn, says that he is the president of the Central Trust Company of New York, complainant in the above bill; that the said bill is true of his own knowledge, except as to those matters which are therein stated to be on information and belief, and as to those matters he believes it to be true.

H. F. SPAULDING.

Sworn to before me this 13th day of October, 1883.
EDWARD L. ORAN,
U. S. Commissioner for the Southern Dist. of New York. [SEAL.]

16 And afterwards, to wit, on the 20th day of Nov., A. D. 1883, the following subpœna was filed in this cause in said court, viz:

Subpœna.

THE UNITED STATES OF AMERICA, } *ss:*
Northern District of Ohio, Western Division, }

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to summon The Toledo, Delphos and Burlington Railroad Company, The Toledo, Cincinnati and St. Louis Railroad Company, Grenville D. Braman, if they be found in your district, to be and appear in the circuit court of the United States in and for the division and district aforesaid, at Toledo, on the first Monday in January next, to answer a certain bill in chancery filed and exhibited in said court against them by The Central Trust Company of New York, a corporation, as trustee under a certain indenture of trust and mortgage made by the Toledo, Delphos and Burlington Railroad Company, dated January 17th, 1880. Hereof they are not to fail under the penalty of the law thence ensuing, and have you then and there this writ.

[SEAL.] Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 22nd day of October, A. D. 1883, and in the 108th year of the Independence of the United States of America.

AUGUSTUS J. RICKS, *Clerk.*

MEMORANDUM.—The said defendants are required to enter their appearance in this suit in the clerk's office of said court, in
17 Toledo, on or before the first Monday of December, 1883; otherwise the said bill may be taken *pro confesso.*

A. J. RICKS, *Clerk.*

NORTHERN DISTRICT OF OHIO, *ss:*

This writ returned not served as to the within-named The Toledo, Delphos and Burlington Railroad Company and The Toledo, Cincinnati and St. Louis Railroad Company by order of complainant's solicitor; the within-named Grenville D. Braman not found within said district, neither has he a residence therein.

W. F. GOODSPEED,
U. S. Marshal,
By J. C. MOORE, *Deputy.*

(Endorsed:) Subpœna. Returnable December 3rd, 1883. Rule day for appearance, December 3rd, 1883. Rule day for answer, January 7th, 1884. Returned and filed Nov. 20th, 1883. A. J. Ricks, clerk.

18 And afterwards, to wit, on the 22nd day of October, A. D. 1883, the following petition was filed in this cause in said court, viz:

Original Petition of Jas. M. Quigley et al. for Leave to Intervene.

Circuit Court of the United States, Northern District of Ohio, Western Division.

THE CENTRAL TRUST COMPANY
against
THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD COMPANY and Others.

To the said circuit court:

The petition of James M. Quigley, Henry R. Low, Waldo C. Hutchings, all of the State of New York; J. Dummett and James Stevenson, respectfully show that they and those whom they represent are the holders and owners of about five hundred thousand dollars of the first-mortgage bonds of the Toledo, Delphos and Burlington Railroad Company; that the said bonds are secured by a mortgage of the said railroad company to the said Central Trust Company, as trustee, dated January 17th, 1880, which said mortgage this action is brought to foreclose.

The said mortgage by the terms thereof embraces and includes a line of railroad, with its franchises, equipments, and appurtenances, extending from Toledo, in the State of Ohio, through the counties of Lucas, Wood, Henry, Putnam, Allen, and Van Wert, in the said State, and the counties of Adams, Wells, Huntington, Wabash, Miami, Grant, and Howard, in the State of Indiana, being, as stated in the said mortgage, about one hundred and eighty miles in length; that the whole amount of the indebtedness secured by the said mortgage is one million two hundred and fifty thousand dollars ($1,250,000), which represents an incumbrance of only less
19 than seven thousand dollars per mile of said road. The bonds representing this indebtedness were strongly recommended to the public for investment on the ground that relatively to the value of the property the mortgage debt per mile and in the aggregate was small, and that under no conceivable circumstance could a less net amount be earned on that line than that required to pay the annual interest charges.

By representations of this character your petitioners and those represented by them and others were induced to buy all of the said bonds for investment, relying solely upon their assumed intrinsic value; that the whole amount thereof is now outstanding, together with interest overdue and unpaid to the amount of more than seventy-five thousand dollars ($75,000). Your petitioners are informed and believe that under intelligent and honest management the said railroad and its appurtenances would have been and continued to be a safe and adequate security for the said mortgage debt, with the principal and interest thereof; but your petitioners say that the mortgaged property has been grossly mismanaged and wrongfully and fraudulently dealt with, wasted, and misappropriated, and that your petitioners and all the other bondholders are in imminent

danger of losing their mortgage security altogether, unless this court shall be pleased to take the said property into its possession through a receiver for its preservation and protection, and to permit your petitioners to come in as parties complainant in this cause that they may protect, defend, and enforce their own rights in the premises.

And in this behalf your petitioners aver that after the execution and delivery of the said mortgage and the said bonds by the said Toledo, Delphos, and Burlington Company the said company
20 entered into a so-called combination or arrangement with other railroad companies or organizations, nine or more in number, but as to the terms and provisions of which your petitioners have no knowledge; that such other companies or organizations, or some of them, existed and still exist, as your petitioners are informed and believe, under the following names—that is to say, the Charleston, Neoga and St. Louis R. R. Co., the Tuscola, Charleston and Vincennes R. R. Co., both of Illinois; the Toledo, Cincinnati and St. Louis R. R. Co., the Kokomo and Frankfort R. R. Co., both of the State of Indiana; the Dayton, Covington and Toledo R. R. Co., the Dayton and Southeastern R. R. Co., the Iron R. R. Co., the Cincinnati Northern Railway Co., and the Spring Grove, Avondale and Cincinnati R. R. Co., of the State of New York.

That the said combination of companies or organizations assumed the name of the Toledo, Cincinnati and St. Louis Railroad Company, but whether by such arrangement and combination a new corporation under that name was lawfully created your petitioners have no knowledge; but your petitioners are informed and believe that the said organization under the name last aforesaid has assumed to act and does act as a corporation in the premises.

That the said pretended corporation is not and never was possessed of any railroad or railroads or corporate franchises, except such interest therein, respectively, if any, as it may have acquired therein by reason of the combination of properties above mentioned.

That each of the said companies above named, before entering into the said combination, had, as your petitioners are informed and believe, mortgaged their respective properties and franchises, which mortgages were then outstanding and unsatisfied; that by
21 reason of the said outstanding mortgages the said combination or consolidation of companies related to and affected merely the equity of redemption in the said several mortgaged properties and did not embrace or in anywise affect the estates of the respective mortgagees nor the rights of mortgage creditors, subject to all of which the said combination or consolidation was made, and that the rights of the said several mortgagees, the respective estates acquired by the said mortgagees, and the rights of creditors under the said mortgages, respectively, remained separate and distinct, unimpaired and unaffected, by the said combination of the several equities of redemption.

That your petitioners and other bondholders are in nowise privy or parties to nor was their said trustee, The Central Trust Company, to the combination or consolidation before mentioned, nor are they

or either or any of them, as your petitioners are advised, in any manner bound or affected thereby.

Your petitioners further aver that some time after the aforesaid pretended consolidation or combination, the said Toledo, Cincinnati and St. Louis Railroad Company, so called, in pretending to be a corporation and acting as such, took possession of the mortgaged premises, as well of the other lines of railroad hereinbefore mentioned, but at what date such possession was taken your petitioners are not informed; that at the date of such change of possession the premises mortgaged to secure the bonds held by your petitioners and others were in fairly good condition, with an equipment of rolling stock appertaining to the said mortgaged premises, belonging to the mortgagor and embraced in the mortgage, of the value of one hundred and twenty-five thousand dollars ($125,000) or over, upon all of which the said mortgage was first a lien.

22 That after such change of possession and in the interest of said general combination and to the great prejudice and loss of your petitioners and others in like situation the mortgage premises — not kept in repair as required by good railroad management, but permitted to run down and fall into decay, while the income and revenue thereof were appropriated to the general uses of the said combination and for the maintenance of other lines in which your petitioners have no interest; that the rolling stock of your petitioners was likewise diverted and misappropriated and applied to the use of the said combination, and is still in the possession of the said organization existing under the name of the Toledo, Cincinnati and St. Louis R. R. Co., and widely scattered, as your petitioners are informed and believe, over the said system of roads.

Your petitioners are informed and believe that all of the said lines of the railroad constituting the aforesaid combination were before such combination subject to mortgages; that such mortgages at present, excluding the mortgage to secure the bonds held by your petitioners and others, amount to more than twenty millions of dollars.

That the said organization called the Toledo, Cincinnati and St. Louis Railroad Company, although possessing no railroads or interest in railroads except the several equities of redemption in the several lines before mentioned, and therefore having a merely nominal existence, has since its organization incurred debts and obligations to a very large amount, exceeding to the amount of several millions of dollars, but your petitioners are not informed as to the exact amount of such indebtedness. Among other things, the said organization created a so-called car trust for the purpose of obtain-

23 ing equipment for the said system, under which, as your petitioners are informed and believe, the extravagant rate of twenty per cent. per annum is paid for the use of rolling stock, a part of which burden is made to fall upon the premises mortgaged for the security of the bonds of your petitioners, while the rolling stock belonging to the mortgaged premises is, as before stated, diverted to other uses and purposes.

Your petitioners further aver that the said organization called the

Toledo, Cincinnati and St. Louis Railroad Company is, in fact, utterly insolvent, and that the earnings of the whole system are at present not more than sufficient to pay the current expenses of operation, leaving nothing for the payment of the principal or interest of petitioners' mortgage debt or any other mortgage debt or any indebtedness whatsoever; that, as your petitioners are informed and believe, proceedings have been or are about to be taken for foreclosure of each and all of the mortgages upon the several lines of railroad constituting the above-mentioned combination. Your petitioners are further informed and believe that a certain scheme has been devised in Boston, Massachusetts, by certain persons to your petitioners unknown, but who, your petitioners are informed and believe, are largely interested in the said so-called car trust and in the unsecured indebtedness of the said so-called Toledo, Cincinnati and St. Louis Railroad Company, by which it is proposed so to manipulate, in some manner or form to your petitioners unknown, the foreclosure proceedings above referred to as to bring about as the practical result the confiscation of the mortgage bonds held by your petitioners and others, as well as the mortgage bonds of the several railroads constituting the system aforesaid and the creation
24 of stock to represent such indebtedness, to be followed by the creation of a first mortgage upon the entire system to raise about five millions of dollars ($5,000,000), two millions and a half thereof to be applied to the payment of the unsecured debt due in respect of the above-mentioned car trust. Your petitioners further aver, upon information and belief, that the action heretofore brought by one Braman against the said so-called Toledo, Cincinnati and St. Louis Railroad Company and now pending in this court, and in which suit a receiver was appointed of the entire organization of railroads above mentioned, was brought in the interest of and in order to further the aforesaid or some similar scheme and device for the destruction of the mortgage security of your petitioners and others.

That the said suit was brought with the consent and connivance of the said so-called Toledo, Cincinnati and St. Louis Railroad Company, and on like information and belief your petitioners aver that the said receivership, although manifestly destructive of the rights and interests of your petitioners and others, was established with the consent or without the opposition of the trustee of your petitioners' mortgage, the said Central Trust Company.

That the said Central Trust Company is trustee, as your petitioners are informed and believe, of seventeen or eighteen different mortgages upon the lines of road constituting the aforesaid combination, exclusive of the mortgage made by the Toledo, Delphos and Burlington Railroad Company to secure the bonds of your petitioners and others; that the rights of each mortgagee under the said several mortgages are separate and distinct from, hostile to, and in conflict with the rights of every other; that by reason of the premises it is manifestly impossible that the said trust company should or
25 could represent suitably and with impartiality the rights of the respective beneficiaries under the said several mortgages;

that the rights of your petitioners and other bondholders under the mortgage aforesaid are separate and distinct from the rights of all other mortgagees and bondholders, between whom and your petitioners there is no privity and no relation whatsoever.

That notwithstanding the premises your petitioners are informed and believe that it is the purpose and intention of the said Central Trust Company, in direct violation of its duty as trustee, to apply for the appointment of a single receiver to represent the said entire system and the various and conflicting rights and interests of the respective mortgagees above mentioned. Your petitioners aver that such application is in direct hostility to the rights and interests of your petitioners and prejudicial to their mortgage security.

Your petitioners are advised that the said combination or consolidation is in effect abrogated and avoided by actions for the foreclosure of the several antecedent mortgages, and that the rights of your petitioners under their mortgage aforesaid, to all intents and purposes, are separate and distinct as though no such combination or consolidation had ever taken place; that the rights of the said several mortgagees of the respective railroads before mentioned are not identical, but in all respects are separate and distinct as before the said combination, and that it is impossible that one receiver should properly represent their conflicting rights and interests.

That in respect to expenditures, arrangements for business, the employment of rolling stock, tracing and getting the same
26 into possession, putting the same into repair, arranging for allowances for the use thereof with other lines, making arrangements for the proper prorating of freight and passenger traffic with connecting lines, and so on, questions must necessarily arise touching the respective interests of the mortgagees, rendering it important and necessary that the rights of your petitioners should be represented by some person whose sole duty it shall be to look after and protect their rights and interests alone.

Your petitioners further aver that on or about the said 17th day of January, 1880, the said Toledo, Delphos and Burlington Railroad Company executed and delivered to the said Central Trust Company another mortgage, subordinate in point of lien to the mortgage made to secure the bonds of your petitioners and others, of the same premises, to secure an issue of bonds to the amount of one million two hundred and fifty thousand dollars ($1,250,000), called income bonds; that afterwards and on or about the month of July, 1880, the said Toledo, Delphos and Burlington Railroad Company executed another mortgage, called a terminal trust mortgage, to secure an issue of bonds amounting in the aggregate to two hundred and fifty thousand dollars ($250,000) and alleged to embrace property mainly lying within the city of Toledo, in the State of Ohio, including property acquired subsequent to the date of the said mortgage to secure bonds held by your petitioners and others; that an action is pending in the court of common pleas for Lucas county, in the State of Ohio, for the foreclosure of the said terminal trust mortgage. Your petitioner further avers that it is necessary and proper that an enquiry should be had before a master for the purpose of ascertain-

ing what property is embraced in the mortgage to secure the
27 bonds of your petitioners and others, including rolling stock and equipment and the condition, location, and situation thereof, and as to the amount of the outstanding indebtedness secured by the said mortgage.

Your petitioners pray that, the premises considered, they may be made parties co-plaintiff or defendant in this action, as may appear to the court to be most meet and proper, and that they may have notice from time to time of all proceedings taken in this action, that they may be heard for the protection of their rights and interests; that it may be referred to a master to enquire and report what property is embraced and included in the mortgage made to secure their said bonds as aforesaid and the location, situation, and condition thereof, and also the amount of the outstanding indebtedness secured by the said mortgage, with directions to report to this court with all convenient speed.

And your petitioners will ever pray, etc.

W. W. MACFARLAND, *Att'y, and*
JAMES M. QUIGLEY.

UNITED STATES OF AMERICA, }
State of Ohio, Hamilton Co., } *ss:*

James M. Quigley, one of the petitioners above named, being duly sworn, says that the allegations of the foregoing petition are true, according to his best knowledge, information, and belief.

[SEAL.] WM. H. POPE,
Notary Public in and for Hamilton Co., O.

10, 19, '83.

28 And afterwards, to wit, on the 31st day of October, A. D. 1883, the following order was filed in this cause in said court, viz:

Appearance of T., D. & B. R. R. Co. & T., C. & St. L. R. R. Co.

Circuit Court of the United States, Northern District of Ohio, Western Division.

THE CENTRAL TRUST CO. OF NEW YORK, as Trustee, etc., }
vs.
THE TOLEDO, DELPHOS AND BURLINGTON R. R. Co. and THE Toledo, Cincinnati and St. Louis R. R. Co. and Others, Defendants. }

Now comes Henry D. Hyde, Esq., and enters the appearance of the Toledo, Delphos and Burlington Railroad Company and the Toledo, Cincinnati and St. Louis Railroad Company to the bill of complaint in this suit and waives the issuing of process against said defendants.

HENRY D. HYDE.

29 And afterwards, to wit, on the 25th day of April, A. D. 1884, the following intervening petition was filed in this cause in said court, viz:

Intervening Petition of Thomas H. Hamilton.

The Circuit Court of the United States, Northern District of Ohio, Western Division.

THE CENTRAL TRUST COMPANY OF NEW YORK, a Corporation, as Trustee under a Certain Indenture of Trust and Mortgage Made by the Toledo, Delphos and Burlington Railroad Company, Dated January 17th, 1880, Complainant, *against* THE TOLEDO, DELPHOS AND BURLINGTON RAILROAD Company, The Toledo, Cincinnati and St. Louis Railroad Company, Grenville D. Braman, Defendants.	In Equity. Case No. 382.

To the judges of the United States circuit court for the northern district of the State of Ohio:

Thomas H. Hamilton, a resident of the city of Toledo, in the State of Ohio, having first obtained leave of the court therefor, now comes and files his petition in the above-entitled cause and represents to the court:

First Cause of Action.

On the 20th day of March, 1883, in consideration of certain agreements and payments therein recited, your petitioner, Thomas H. Hamilton, made a contract with the defendant, The Toledo, Cincinnati and St. Louis Railroad Company, and also two contracts supplementary thereto, dated, respectively, May 9th, 1883, and June 2nd, 1883, copies of which said original agreement, as well
30 as the two supplementary ones, are hereto attached, marked, respectively, "Exhibits B, C, D," whereby your petitioner agreed to construct for the said defendant a certain crib dock on the banks of the Maumee river, in the city of Toledo and State of Ohio, upon land owned by said defendant railroad company, and which land is fully described in the second cause of action herein, and here referred to and made a part of this cause of action.

And said defendant railroad company agreed to pay your petitioner the several amounts in said contract set forth at the several times and in the manner set out in said contract.

Your petitioner says that he has duly performed all and singular the conditions of said agreement on his part, but the said defendant railroad company has failed to make the payments stipulated in said agreement, and there is now due to your petitioner from said defendant railroad company on said agreements the sum of twenty-seven thousand eight hundred and sixty-one dollars and eighty cents ($27,861.80), with interest thereon from the first day of August, A. D.

1883. A detailed account of the labor performed and material furnished by your petitioner under said agreements, and the payments made by the said defendant railroad company, with the balance due to your petitioner from said defendant, is hereto attached, marked "Exhibit A," and made part hereof.

Your petitioner further says that on the 27th day of January, A. D. 1884, by the order of this court in this cause, William I. Craig was duly appointed receiver of all the property and assets of the said defendant, The Toledo, Cincinnati and St. Louis R. R. Co., and the other railroads defendant herein, and is still in possession
31 of said property, rights, and assets, as such receiver, under said order.

Your petitioner further says that the labor performed and materials furnished by him, as set forth in said Exhibit A, hereto attached, was performed and used in permanently improving and rendering more valuable the property of the defendant, The Toledo, Cincinnati and St. Louis Railroad Company, mortgaged to secure the several series of bonds issued by said last-named company and the several companies embodied in said last-named company by the consolidation fully set out in the several pleadings in this cause hereinbefore made.

For a second cause of action your petitioner says that the account in the first cause of action described accrued for labor and materials furnished by your petitioner on the order of said defendant railroad company and the written agreements in the said first cause of action set forth and with the consent of one George William Ballou, hereafter referred to in this petition, in erecting a dock, between the 20th day of March, A. D. 1883, and the first day of August, A. D. 1883, on certain premises owned by said defendant railroad company and described as follows, to wit:

First. All that part of lot number thirteen (13), in river tract No. eight (8), in the United States reserve of twelve miles square at the foot of the rapids of the Miami of Lake Erie, which lies between the land owned by the Toledo, Wabash and Western Railroad Company and the Maumee river, together with all the riparian rights belonging to the same, said land being situated in the city of
32 Toledo, county of Lucas and State of Ohio.

Second. All that part of lot number seventeen (17), in river tract number nine (9) of the United States reserve of twelve miles square at the foot of the rapids of the Miami of Lake Erie, which lies between the track of the Wabash, St. Louis and Pacific Railroad Company and the Maumee river, all in the city of Toledo, county of Lucas and State of Ohio.

Said account accrued on the first day of August, A. D. 1883, and on the 30th day of August, A. D. 1883, at 3.35 o'clock p. m., your petitioner filed with the recorder of Lucas county, Ohio, under the statute provided for obtaining mechanics' liens, an affidavit containing an itemized account of the amount and value of such work and labor, with all credits and offsets, with statements of amounts due and times when the same should have been paid, which lien is recorded in Book No. 5, pages 155 *seq.*, Records of Liens of Lucas County, Ohio.

No part of said amount claimed by your petitioner's first cause of action has ever been paid.

Your petitioner further says that the legal title to the premises described is in one George William Ballou, who is a resident of the city of New York, as your petitioner is informed and believes, but your petitioner avers that said Ballou holds said legal title to said premises in trust for the said defendant railroad company, which is the real owner of said premises.

And your petitioner says that he is informed that said Ballou claims some interest in said premises, but your petitioner avers that if he has any such interest it is subordinate to your petitioner's lien, and asks that said Ballou be made a party to this action,
33 and, under proper process, compelled to set up his interest, if any he have, or be forever barred.

Your petitioner therefore asks judgment against the defendant, The Toledo, Cincinnati and St. Louis Railroad Company, in the sum of twenty-seven thousand eight hundred and sixty-one dollars and eighty cents ($27,861.80), with interest from August 1st, A. D. 1883, and that said receiver heretofore appointed by this court in this cause be ordered to pay the same from the funds now in his hands or that may come into his possession from the operation of said road or from the sale of the road or other property of said defendant company or any part thereof, under any order of this court heretofore or hereafter made in this cause, and that in default of payment thereof in such manner said premises hereinbefore described be sold and the proceeds applied to the payment of this debt, and for such other relief as is just.

A. W. SCOTT,
Counsel for Hamilton.

STATE OF OHIO, } ss:
Lucas County, }

Thomas H. Hamilton, being first duly sworn, says that he is the petitioner herein and that the facts stated in the foregoing petition are true, as he verily believes.

THOMAS H. HAMILTON.

Sworn to before me and subscribed in my presence this 25th day of April, A. D. 1884.

REYNOLDS R. KINKADE,
Notary Public, Lucas County, Ohio.

34 "EXHIBIT B."

Specifications for Crib Dock and Dredging in the Maumee River at Toledo Ohio, for the Toledo, Cincinnati and St. Louis Railroad Company.

"A."

Foundation for crib to be dredged to level bottom two feet deeper than channel, with care that the structure shall settle to a level and dock line.

Dimensions.

The crib to be 500 feet in length and 32 feet in width, and to be constructed according to the accompanying drawings. The grillage to rest two feet below the bottom of the channel, sixteen feet deep, at the average height of water, and to be secured in exact position by piles securely driven.

Timber.

All timber above the level of two feet below the average height of water to be of white or burr oak, except that wall parallel to and ten feet back from the dock line, which may be of soft wood.

Quality of Timber.

All timber above and below the water line to be of good, merchantable quality, free from splits, shakes, decay, rotten knots, and all other defects tending to impair durability and strength. Timber to be squarely sawed or hewn to all dimensions and to be 32 feet lengths on dock wall and grillage.

Construction.

The structure to be well and squarely built and securely bolted and before acceptance must be filled with dredged material.

35 Braces and floor.

The contractor will be responsible for the sufficiency of bracing until the structure is in place and secured. He will also be responsible for flooring sufficient to insure an even settlement.

Framing.

Framing must be done accurately and care taken in handling framed material not to chip off edges or split down dovetails. In framing timber no stick must be so cut as to fall easily into place, but, on the contrary, each stick will be required to be mauled into place and subject to the foregoing paragraph. Timbers of longitudinal and cross walls to be framed together with dovetail joints.

Bolting.

To prevent splitting while bolting timber must be bored to receive the bolts, boring being slightly less than size of bolt. All timbers to be bolted together with drift bolts three-quarters of an inch by eighteen inches and not more than eight feet apart.

Quality of iron.

All iron must be of best quality of wrought iron. Any bolts or spikes failing in driving for any cause must be replaced by the contractor.

Wall plank.

Plank walls to be secured by 30-penny nails not more than a foot apart. Planking on dock to be three-inch thickness, firmly spiked.

Workmanship.

All work must be done in a workmanlike manner, strictly in accordance with plans and specifications or such modifications of the same as may be made by the chief engineer or through his
36 instructions to his assistant or inspector, in writing.

Specifications for dredging.

The work to be done consists in excavating a channel twenty-five feet wide from the Wabash dock on the Maumee river to the proposed dock of the Toledo, Cincinnati and St. Louis R. R. Co., and a channel two hundred feet in width and five hundred feet long opposite the latter dock, and to excavate a foundation for the crib dock about thirty-five feet wide and five hundred feet long and to a uniform depth of eighteen feet below the average height of water.

All material excavated to be deposited in and back of the crib dock to a height of about six feet above the average surface of water, extending as far towards the shore as the material dredged will fill to the required height.

The uniform depth of channel is to be sixteen feet at average water.

The amount of material excavated shall be determined by measurement in the fill.

The precise location of the work to be done shall be determined by engineer of second party or his assistants.

Articles of agreement made and entered into 20th day of March, 1883, by and between Thomas H. Hamilton, of the city of Toledo, party of the first part, and The Toledo, Cincinnati and St. Louis Railroad Company, a corporation under and by virtue of the laws of the State of Ohio, party of the second —, witnesseth:

That said party of the first part, for and in consideration of the covenants and agreements hereinafter set out, contracts and agrees with said party of the second part to construct five hundred
37 feet, lineal measure, of crib dock, according to the plans and specifications hereto attached, marked "A," and made part hereof, on the north bank of the Maumee river, in the city of Toledo, and east of the Toledo water-works property, at such place as the engineer in charge may direct, and do the dredging necessary to place and secure the same, and form a channel twenty-five feet wide at the base in said Maumee river from the upper or western end of said dock to the Wabash elevator No. 5.

That all material furnished and work done under this contract shall, before being accepted, be subject to an inspection by an inspector appointed by the Toledo, Cincinnati and St. Louis Railroad Company, and such material or work as does not conform to the specifications set forth in this contract shall be rejected.

And the said first party agrees to complete all said work, according to plans and specifications, on or before the 30th day of June, 1883.

And the said second party, in consideration of the covenants and promises, agrees with said first party to pay for constructing said dock and excavating said channel the following prices, to wit:

$30.50 per lineal foot for dock built, measured in dock line.

21 cts. per cubic yard for all filling in crib and dock not taken from crib bottom.

15 cents per cubic yard, measured in the fill, for excavating crib bottom.

18 cents per lineal foot for all elm piles driven in construction of dock.

12 cts. per pound for all anchor rings.

Said second party further agrees to set the necessary stakes
38 showing the dock line, as well as the channel, extended from said dock to said Wabash elevator, and to establish and mark the dock levels for the use of said first party.

Said second party further agrees to have an estimate made on the first of each month of timber, piles, and other materials put in place and excavating and filling made during the previous month, and shall pay the contract price for the same on or before the 20th day of the month in which the estimate is made, less 15 per cent. thereof, which amount is to be retained by said second party until said work is finished.

Said second party also agrees to have a final estimate made when said — is finished, and to fully pay for the same within thirty days after its said completion, final payment not to be made until said party of the first part has first given a release from all claims and demands whatsoever growing out of this contract, presenting clear evidence that all bills against his said work are fully paid and discharged.

And it is also agreed that if, in any event, the party of the first part shall delay or fail to prosecute faithfully and dilligently the work in accordance with the specifications and requirements of this contract, then in either case the party of the second part shall have power to annul this contract by giving notice, in writing, to that effect to the party of the first part, and the party of the second part shall thereupon be authorized to enter upon and finish said work: Provided, however, That if the party of the first part shall, by freshets, ice, or other force or violence of the elements and by no fault of his own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time may, in writing, be allowed
39 him for such commencement or completion as, in the judgment of the second party, shall be just and reasonable; but such extension or allowance shall in no manner effect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date of completion had been the date originally agreed upon.

And it is further expressly understood and agreed that no claims

shall at any time be made for or on account of extra work or material performed or furnished or alleged to have been performed or furnished, unless under and by virtue of this contract and not expressly bargained for or specified therein, unless such extra work or material shall have been expressly required in writing by the party of the second part or its successors, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the chief engineer of the Toledo, Cincinnati and St. Louis Railroad Company.

It is further understood between the parties that said first party shall retain the possession of said dock and all the appurtenances thereto belonging until full and complete payment is made to him for the labor performed and materials furnished thereon or secured to his satisfaction, and that he shall have a lien on all said property to secure to him the payment of the contract price for all said work and labor so furnished and performed by him.

In witness whereof the parties to this contract have hereunto set their hands on the day and year aforesaid.

THOMAS H. HAMILTON.
THE TOLEDO, CINCINNATI AND
ST. LOUIS R. R. C.,
By E. B. PHILLIPS, *President.*

40 "EXHIBIT C."

"B."

Specifications for Additional Crib-Work Adjacent to the Maumee River Dock of The Toledo, Cincinnati and St. Louis R. R. Company.

A length of seventy feet and twelve feet wide to be attached to the east end of the crib now building, extending at right angles to it, the timber above water line interlocking the two parts. This may all be of soft wood.

A length of four hundred and fifty-five feet and twelve feet wide extending from the southwest corner of the crib now building in the direction of the approach as it shall be located by the engineer of the Toledo, Cincinnati and St. Louis R. R. Co. This shall interlock with the timbers above the water line of the crib now building.

Grillage to rest on even bottom sixteen feet below mean water level. All walls to extend six feet above that level.

The front wall of the crib to be built of twelve-inch thickness and from one foot below mean water level of squared white oak timber, as shall all cross-walls for that height.

All other walls of eight inches thick. Cross-walls to be fifteen feet apart.

Work and material shall be as specified in contract between same parties, dated March 20th, 1883, where not otherwise mentioned in present specifications.

No dredged material shall be deposited for embankment between

crib and shore until piles are there driven. Said embank-
41 ment shall be six feet above mean water level, twelve feet wide on top, with slopes of 2 to 1, and follow the line given by the chief engineer of the party of second part.

Articles of agreement made and entered into this 9th day of May, 1883, by and between Thomas H. Hamilton, of the city of Toledo, party of the first part, and The Toledo, Cincinnati and St. Louis Railroad Company, a corporation under and by virtue of the laws of the State of Ohio, party of the second part, witnesseth:

That the party of the first part, for and in consideration of the covenants and agreements hereinafter set —, contracts and agrees with the said party of the second part to construct five hundred feet, lineal measure, of crib dock, according to the plans and specifications hereto attached, marked "B," and made part hereof, on the north bank of the Maumee river, in the city of Toledo, and east of the Toledo water-works property, at such place as the engineer in charge may direct, and do the dredging necessary to place, secure, and fill the same.

That all material furnished and work done under this contract, before being accepted, shall be subject to an inspection by an inspector appointed by the Toledo, Cincinnati and St. Louis Railroad Company, and such material or work as does not conform to the specifications set forth in this contract shall be rejected.

And the party of the first part further agrees to complete all said work according to said plans and specifications on or before the 15th day of July, 1883.

And the said party of the second part, in consideration of the promises and agreements, agrees with said first party to pay
42 for constructing said dock the following prices, to wit: Thirteen dollars per lineal foot for dock built, measured in the dock line where work is all soft wood.

Fourteen dollars and fifty cents per lineal foot for dock built, measured on the dock line, when built of white oak from one foot below mean water level, front and cross walls.

Twenty-one cents per cubic yard for all filling in the crib not taken from crib bottom, when it shall be necessary to handle such material twice.

Fifteen cents per cubic yard, measured in the fill, for excavating crib bottom when it shall not be necessary to handle such material twice.

Twelve and one-half cents per cubic yard, measured in the fill, for dredging foundations in filling crib or in forming approach embankment between crib and shore, where it may be necessary to.

Eighteen cents per lineal foot for all elm piles driven in construction of dock.

Said second party further agrees to have an estimate made on the first day of every month of all timber, piles, and other material put in place and excavating and filling made during the previous month, and shall pay the contract price for the same on or before the 20th day of the month in which estimate is made, less 15 per cent. thereof,

which amount is to be retained by said second party until said work is finished.

Said second party also agrees to have a final estimate made when said work is finished, and to fully pay for the same within thirty days after its said completion, final payment not to be made until the party of the first part has given a release from all claims and demands whatever growing out of this contract, presenting clear evidence that all bills against his work are fully paid and dis-
43 charged.

And it is also agreed that if in any event the first party shall delay or fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the second part shall have the power to annul this contract by giving notice in writing to that effect to the party of the first part, and the party of the second part shall thereupon be authorized to enter upon and finish said work: Provided, however, That if the party of the first part shall, by freshets, ice, or other force or violence of the elements and by no fault of his own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this contract' such additional time may, in writing, be allowed for such commencement or completion as in the judgment of the second party shall be just and reasonable, but such allowance or extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date of such completion had been the date originally agreed upon; and it is further expressly understood and agreed that no claim whatever shall at any time be made upon the party of the second part for or on account of any extra work or material performed or furnished, unless under and by virtue of this contract and not expressly bargained for or specified therein, unless such extra work or material shall have been expressly required in writing by the party of the second part or its successors, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the chief engineer of the
44 Toledo, Cincinnati and St. Louis Railroad Company.

It is further understood and agreed between the parties hereto that said party of the first part shall retain the possession of said dock and all the appurtenances thereto belonging until full and complete payment is made to him for the labor performed and material furnished thereon or secured to his satisfaction, and that he shall have a lien on all said property to secure him the payment of the contract price for all said material and labor so furnished and performed by him.

In witness whereof the parties to this contract have hereunto set their hands on the days and year aforesaid.

THOMAS H. HAMILTON.
THE TOLEDO, CINCINNATI AND ST. LOUIS R. R. CO.,
By E. E. DWIGHT, *General Manager.*

Witnesses:
H. A. YOUNG & W. A. SARGENT, to E. E. D.

Exhibit D.

C.

Specifications for Additional Crib-Work Adjacent to the Maumee River Dock of The Toledo, Cincinnati and St. Louis R. R. Company.

A length of two hundred and sixty-seven feet and twelve feet wide to be attached to the piece of seventy feet now building on the east end of the 500-foot dock, and being an extension of said seventy feet toward the north shore of the Maumee river, timbers above water line interlocking the two parts.

45 This extension to have a grillage of 12 x 12 timber, and walls on the face to be 12 inches thick. All cross-walls and back walls to be 8 inches thick. Grillage to rest on even bottom twelve and one-half feet below the average height of river. All walls to extend two feet above this average height of river, making a total height of wall of fourteen and one-half feet.

This extension can be built of soft wood; cross-walls to be fifteen feet apart.

Work and material shall be as specified in contract between the same parties dated March 20th, 1883, when not otherwise mentioned in present specifications.

No dredging shall be deposited for embankment between crib and shore until piles are there driven.

Articles of agreement made and entered into this second day of June, 1883, by and between Thomas H. Hamilton, of the city of Toledo, party of the first part, and The Toledo, Cincinnati and St. Louis Railroad Company, a corporation under and by virtue of the laws of the State of Ohio, party of the second part, witnesseth:

That the party of the first part, for and in consideration of the covenants and agreements hereinafter set forth, contracts and agrees with the party of the second part to construct two hundred and sixty-seven feet, lineal measure, of crib dock, according to the specifications hereto attached, marked "C," and made part hereof, on the north bank of the Maumee river, in the city of Toledo, and east of the water-works property, at such place as the engineer in charge may direct, and do the dredging necessary to place, secure, and fill the same.

46 That all material and work done under this contract, before being accepted, shall be subject to an inspection by an inspector appointed by the Toledo, Cincinnati and St. Louis Railroad Company, and such material or work as does not conform to the specifications set forth in this contract shall be rejected.

And the first party further agrees to complete all said work according to said plans and specifications on or before the 15th day of August, A. D. 1883.

And the said party of the second part, in consideration of the promises and covenants, agrees with the said party of the first part to pay for constructing said extension of crib-work the following

prices, to wit: Ten dollars and twenty-five cents per lineal foot for dock built, measured in dock line.

Twenty-one cents per cubic yard for all filling in the crib not taken from crib bottom, where it shall be necessary to handle such material twice.

Fifteen cents per cubic yard, measured in the fill, for excavating crib bottom, when it shall be necessary to handle such material twice.

Twelve and one-half cents per cubic yard, measured in the fill, for dredging foundation, in filling crib, and forming embankment behind crib, where it may be necessary to handle material only once.

Eighteen cents per lineal foot for all elm piles driven in construction of dock.

Said second party further agrees to have an estimate made on the first of each month of all timber, piles, and other material put in place and excavating and filling made during the previous month, and shall pay the contract price for the same on or before the
47 20th day of the month in which the estimate is made, less fifteen per cent. thereof, which amount is to be retained by said second party until said work is finished.

Said second party further agrees to have a final estimate made when said work is finished and to fully pay for the same within thirty days after its completion; final payment not to be made until said party of the first part has first given a release from all claims and demands whatsoever growing out of this contract, presenting clear evidence that all bills against his work are fully paid and discharged.

And it is also agreed that if in any event the party of the first part shall delay or fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract in either case the party of the second part shall have power to annul this contract by giving notice in writing to that effect to the party of the first part, and the party of the second part shall thereupon be authorized to enter upon and finish said work: Provided, however, That if the party of the first part shall, by freshets or other force or violence of the elements and by no fault of his own, be prevented either from commencing or completing the work or delivering the material at the time agreed upon in this contract, such additional time may, in writing, be allowed him for such commencement or completion as in the judgment of the second party shall be just and reasonable, but such allowance or extension shall in no manner affect the rights and obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date of such completion had been the date originally agreed upon.

48 And it is further expressly understood and agreed that no claim shall at any time be made on the party of the second part for or on account of any extra work or material performed or furnished, unless under and by virtue of this contract and not expressly bargained for or specified therein, unless such extra work or material shall have been expressly required, in writing, by the party

of the second part or its successors, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the chief engineer of the Toledo, Cincinnati and St. Louis Railroad Company.

It is further understood and agreed between the parties hereto that said first party shall retain possession of said dock or crib work and all the appurtenances thereto belonging until full and complete payment is made to him for the labor performed and materials furnished thereon or secured to his satisfaction, and that he shall have a lien on all said property to secure him the contract price for all said material and labor so performed and furnished.

In witness whereof the said parties to this contract have hereunto set their hands on the day and year first aforesaid.

TOLEDO, CINCINNATI AND ST. LOUIS R. R. CO.,
By E. E. DWIGHT, *General Manager.*
THOMAS H. HAMILTON.

49 The Toledo, Cincinnate and St. Louis R. R. Co. to T. H. Hamilton, Dr., Toledo, Ohio.

1883.					
July.	For 500 lin. ft. crib dock, @		$31½	$15,750 00	
	" 70 " " "		13	910 00	
	" 267 " " "		10¼	2,736 75	
	" 455 " " "		14½	6,597 50	
	" 5,970 " piling " "		18c.	1,074 60	
	" 994 lbs. anchor rings, "		12c.	119 28	
	" 263 " wro't iron, extra, @		5c.	13 15	
	" 61 " cart-washers, "		4c.	2 44	
	" excavating from channel, 7,034 cu. yds., 21c.			14,773 08	
	" excavating under crib, 6,283 cu. yds., 15c.			942 45	
	" excavating under crib, 445 cu. yds., 12½c.			55 63	
					42,974 88

Less amount vouchered as follows:

April voucher, No.	435		10,113 08	
May " "	221		6,451 16	
" " "	222		688 61	
" " "	237		2,455 35	
June " "	170		10,309 87	
				30,018 07
Balance due				12,956 81

There is due and unpaid the following am'ts:

May voucher, #221	6,451 16	
Less advance	1,856 04	
		4,595 12
June voucher, #170		10,309 87
This "		12,956 81
		27,861 80

I certify the above statement is correct.
Toledo, O., Aug. 23, '83.

C. S. ANTHONY, *Auditor.*

Approved:
E. E. DWIGHT.

50 And afterwards, to wit, on the 10th day of Dec., 1884, being a day of the December term, A. D. 1884, of said court—present the Honorable John Baxter, circuit judge, and Hon. Martin Welker, district judge—the following order was entered in said cause in said court, viz:

Order Making Jas. M. Quigley et al. Co-complainants.

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

THE CENTRAL TRUST COMPANY OF NEW YORK and Others, Complainants,
vs.
THE TOLEDO, DELPHOS AND BURLINGTON R. R. Co., and Others, Defendants.
} No. 382. In Chancery.

Now this case comes on to be heard upon the application of James M. Quigley, Charles T. Harbeck, and John McNab, committee and trustees by special trust agreement for Toledo, Delphos and Burlington R. R. Co., first-mortgage bondholders, to be made co-complainants with the Central Trust Company of New York and for leave to file an amendment to the original bill filed in this cause by said The Central Trust Company of New York; and it now appearing to the court that on the 10th day of November, A. D. 1884, the circuit court of the United States for the district of Indiana did grant such application and did, by order of court, admit said James M. Quigley, Charles T. Harbeck, and John McNab as co-complainants in the cause of The Central Trust Company of New York *vs.* The Toledo, Delphos and Burlington Railroad Company, The Toledo Cincinnati and St. Louis Railroad Company, and others, now pending in said circuit court of the United States for the district of Indiana; and it now further appearing to the court that on the 5th day of December, A. D. 1884, the said circuit court of the United States for the district of Indiana did grant unto said co-com-
51 plainants leave to file in said cause their amendment to the original bill filed by the said The Central Trust Company of

New York, and that on said 5th day of December, 1884, said co-complainants did, pursuant to said leave of court, file in said cause their amendment; and it further appearing to the court that said co-complainants have delivered to the clerk of this court duly certified copies of said orders of the circuit court of the United States for the district of Indiana of Nov. 10th and of Dec. 5th, 1884, and a duly certified copy of said amendment to the original bill filed by the said The Central Trust Company of New York: Now, therefore, in pursuance of and in accordance with the order of this court entered in this cause on Dec. 19, 1883, the said application of the said James M. Quigley, Charles T. Harbeck, and John McNab to be made co-complainants with the said The Central Trust Company of New York in this cause in this court and for leave to file their said amendment to said original bill in this cause in this court is now granted by the court; and it is now ordered that the said James M. Quigley, Charles T. Harbeck, and John McNab be, and they are hereby, made co-complainants in this cause, and are hereby granted leave to file their said amendment to said original bill filed in this cause, and the clerk of this court is hereby directed to file said certified copies of said orders of Nov. 10th and Dec. 5th, 1884, and said certified copy of said amendment in this cause.

52 And afterwards, to wit, on the 10th day of December A. D. 1884, the following amendment was filed in this cause, in said court, viz:

Amendment to Original Bill.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE CENTRAL TRUST COMPANY OF NEW YORK, JAMES M. Quigley, John McNab, and Charles T. Norbeck, and Others, Complainants,
vs.
THE TOLEDO, DELPHOS AND BURLINGTON RAILROAD COMPANY, The Toledo, Cincinnati and St. Louis Railroad Company, and Others, Defendants.
} No. 382.

Come now complainants James M. Quigley, Charles T. Harbeck, and John McNab, and, by leave of court first had and obtained, file the following amendment to the original bill of complaint herein filed Oct. 20th, 1883, by the Central Trust Company of New York, as trustee, to wit:

I. Your orators aver that prior to March, 1878, the Toledo and Maumee Narrow Gauge Railroad Company, a corporation of the State of Ohio, had organized a railroad company and projected and constructed and was operating a line of road from a point in the city of Toledo, Ohio, to the village of Maumee City, now South Toledo, Ohio, the line of said Toledo and Maumee Narrow Gauge railroad then running along Park avenue and the side of Broadway, in said city, to a point on said street known as Broadway; that on

or about the 25th day of March, 1878, the city of Toledo, by ordinance duly enacted, granted to the said Toledo and Maumee Narrow Gauge Railroad Company and to the Toledo and Grand Rapids Railroad Company, another corporation of the said State of
53 Ohio, the right of way over and upon and the right to construct and operate a railroad through and upon Canal avenue, an alley lying between Vinton street and the Miami and Erie canal, Mill street, the northerly thirty (30) feet of the abandoned bed of the Miami and Erie canal, and Washington street from Erie street to Swan creek, in said city of Toledo; which said ordinance of March 25th, 1878, was amended and the grant therein contained affirmed by an ordinance of said city duly passed by the common council thereof on the 6th day of October, 1879, to which said ordinance of said city your orators here now beg leave to refer the court with the same force and effect as if the same were here at large set forth; that under said grant of right of way and under other grants of right of way, purchases, and condemnations made by said Toledo and Maumee Narrow Gauge Railroad Company and its successor, the Toledo, Delphos and Burlington Railroad Company had, prior to the 17th day of January, 1880, constructed and was operating its said line of railway in the said city of Toledo and from said city of Toledo to the village of Maumee City, now South Toledo, Ohio; that said line of railway so constructed and in operation belonging to and the property of the said Toledo and Maumee Narrow Gauge Railroad Company and its said successor, the Toledo, Delphos and Burlington Railroad Company, extended from the southeasterly end of Washington street, in the city of Toledo, Lucas county, Ohio; thence northwesterly along Washington street to the canal lands in said city; thence southwesterly along said abandoned canal lands to Swan creek in said city; thence over said Swan creek and the Miami and Erie canal and over and along Mill street and Canal avenue, in said city, to the westerly limit thereof, and thence across the westerly limit of said city of Toledo, and thence to the said
54 village of Maumee City, now South Toledo, in said Lucas county, Ohio; and that upon its said right of way and property said Toledo and Maumee Narrow Gauge Railroad Company and its said successor, the Toledo, Delphos and Burlington Railroad Company, there had constructed and owned certain shops, station grounds, side-track grounds, main tracks and side tracks, and other terminal facilities at and in said city of Toledo.

II. And your orators further aver that the said Toledo and Grand Rapids Railroad Company did not build, construct, or own any continuous line of railroad upon the right of way granted by said city to the said Toledo and Maumee Narrow Gauge Railroad Company and the Toledo and Grand Rapids Railroad Company, but that said Toledo and Maumee Narrow Gauge Railroad Company and its successor by consolidation, the Toledo, Delphos and Burlington Railroad Company, did construct, own, and operate a line of railroad over, along, and upon said right so granted by said city; that said Toledo and Grand Rapids Railroad Company did, as your orators are informed and believe, construct a line of railroad from the end

of the said Toledo and Maumee Narrow Gauge railroad, at the village of Maumee City, now South Toledo, Ohio, to Waterville, in said State of Ohio, a distance of about six miles, and that at and prior to the 17th day of January, 1880, said Toledo and Grand Rapids Railroad Company did not own or possess any line of railroad or any railroad property in said city of Toledo other than the right conferred by the city of Toledo to build and operate a line of railroad as hereinabove described in said city jointly with the said Toledo and Maumee Narrow Gauge Railroad Company, which said grant of right of way was never used by said Toledo and Grand Rapids Railroad Company by the construction and main-
55 tenance and operation of any continuous line of railroad thereon.

III. That on or about the first day of May, 1879, the said Toledo and Maumee Narrow Gauge Railroad Company, the Toledo, Delphos and Indianapolis Railroad Company, a corporation organized and existing under the laws of the State of Ohio; the Delphos and Kokomo Railroad Company, a corporation organized and existing under the laws of the State of Ohio, and the Delphos, Bluffton and Frankfort Railroad Company, a corporation organized and existing under the laws of the State of Indiana, by proper and lawful agreements there made and entered into by and between said several railroad companies, did consolidate the stock and franchises of said several railroad corporations with a single consolidated corporation under the name and style of the Toledo, Delphos and Burlington Railroad Company, said consolidated company then owning and operating a continuous line of road from the point hereinbefore designated, in the city of Toledo, to the village of Warren, in the State of Indiana, with an incompleted line of railroad from said village of Warren, in the State of Indiana, to the city of Kokomo, in said State of Indiana; that by said consolidation the said consolidated company, the Toledo, Delphos and Burlington Railroad Company, became the owner of all the railroad property, rights of way, tracks, side tracks, depot grounds, station grounds, shops, machinery, and all terminal facilities of and belonging to the said Toledo and Maumee Narrow Gauge Railroad Company, subject only to the then outstanding debts and obligations of the said Toledo and Maumee Narrow Gauge Railroad Company; that on the 17th day of January, 1880, the said consolidated company, the Toledo, Delphos and Burlington Railroad Company, executed its first mortgage or trust deed to secure the payment of $1,250,000 of bonds, conveying by
56 said trust deed to the Central Trust Company of New York all of its said line of railroad completed and projected from said city of Toledo to the city of Kokomo, in the State of Indiana, together with all and singular the rights of way, road-bed, made or hereafter to be made, its tracks, side tracks, stations, depot grounds, sidings, bridges, rails, fences, machine-shops, buildings, superstructures, and erections in any manner there appertaining to or which should thereafter appertain unto said line of railroad, together with all the engines, cars, machinery, supplies, tools, and fixtures, which were there or should be at any time thereafter held, owned, or ac-

quired by the said railroad company for use in connection with its said railroad, and all its depot grounds, yards, sidings, turnouts, sheds, machine-shops, leasehold rights, and other terminal facilities; that said mortgage or trust deed was duly recorded in each of the several counties into and through which said line of railroad ran, as set forth in the second paragraph of the original bill of complaint filed herein by the Central Trust Company of New York; that said mortgage was duly recorded in the county of Lucas and State of Ohio on the 21st day of January, 1880; that said Central Trust Company accepted said trust and certified the said bonds issued under said trust deed, which said bonds are now outstanding; that on said 17th day of January, 1880, the said Toledo, Delphos and Burlington Railroad Company, by proper corporate action, did make, execute, and deliver to the said Central Trust Company its certain other deed of trust or mortgage to secure the payment of $1,250,000 of other bonds known as "income bonds;" that said Central Trust Company accepted said trust and certified said bonds, and that the same have been issued and are now outstanding.

IV. And your orators aver that said first mortgage of the
57 Toledo, Delphos and Burlington Railroad Company hereinabove described in [is] a first and paramount lien upon all the railroad, rights of way, grounds, superstructures, buildings, property, and terminal facilities of any and every kind and nature whatsoever at any time belonging to the Toledo and Maumee Narrow Gauge Railroad Company and at any time owned or acquired by the said Toledo, Delphos and Burlington Railroad Company at and within the said city of Toledo, State of Ohio, whether owned or acquired before or since the execution of said first mortgage of January 17th, 1880.

And your orators further aver that the said second mortgage or trust deed executed to secure the said bonds known as "income bonds" is a second lien upon all of said property belonging to either the Toledo and Maumee Narrow Gauge Railroad Company or to the Toledo, Delphos and Burlington Railroad Company by its said consolidation, and upon all the property and rights conveyed to and acquired by said Toledo, Delphos and Burlington Railroad Company at any time since said consolidation.

V. Your orators further aver that after said Central Trust Company of New York had accepted the trust in said two mortgages described in the fourth paragraph of this amendment and after the said bonds secured by said two mortgages had been issued and were outstanding, to wit, on the 21st day of June, 1880, the said Toledo, Delphos and Burlington Railroad Company executed its certain other mortgage known as the "terminal trust mortgage," by which said railroad company attempted to secure the payment of $250,000 of bonds known as "Series A, terminal trust, first-mortgage bonds" by conveying and mortgaging all of its railroad, rights of
58 way, property, and terminal facilities at and within the corporate limits of the said city of Toledo, State of Ohio; that in said terminal trust mortgage said Central Trust Company of New York was made trustee;

that said Central Trust Company accepted said trust and certified said bonds, and your orators are informed and believe that the same have been issued and are now outstanding; but your orators aver that said terminal trust bonds and said terminal trust mortgage are not a first and prior lien upon any of the railroad, rights of way, property, and terminal facilities of the said Toledo, Delphos and Burlington Railroad Company at and within said city of Toledo, but that said terminal trust mortgage and said bonds issued thereunder are subject and junior to the said first mortgage executed on January 17th, 1880, and the bonds issued thereunder and are subject and junior to the said second mortgage executed by said Toledo, Delphos and Burlington Railroad Company on said 17th day of January, 1880, to secure the "income bonds," as hereinbefore set forth; and your orators aver that they are informed and believe that the holders of the bonds issued under said terminal trust mortgage and the Central Trust Company, as trustee in said terminal trust mortgage, are claiming and asserting that said terminal trust mortgage is a first and paramount lien upon all the railroad, property, and terminal facilities of said railroad company at and within said city of Toledo, and that the same is superior in lien to the said first mortgage executed on said 17th day of January, 1880, and that said bondholders are seeking and intending to foreclose their said mortgage and sell said railroad and terminal facilities at and within said city of Toledo to secure the payment of their said bonds, to the great prejudice and injury of your orators as the holders of the
59 bonds issued under said first mortgage of January 17th, 1880, hereinabove described.

VI. Your orators further aver that on or about the 12th day of April, 1881, the said Toledo and Grand Rapids Railroad Company conveyed all of its line of railroad and property by proper deed of conveyance to the said Toledo, Delphos and Burlington Railroad Company, but that prior to said conveyance, to wit, on the 4th day of September, 1880, said Toledo and Grand Rapids Railroad Company made and executed its certain pretended mortgage and trust deed, pretending to convey to the said The Central Trust Company of New York all of its railroad, rights, and property at and within the said city of Toledo, but your orators aver that said Toledo and Grand Rapids Railroad Company owned and possessed at said date last named no railroad, buildings, superstructures, property, or terminal facilities at and in said city of Toledo other than the naked grant by said city to construct and operate a line of railroad on and along Canal avenue, in said city, jointly with the said Toledo and Maumee Narrow Gauge Railroad Company, as hereinbefore set forth, and therefore your orators aver that said pretended mortgage of September 4th, A. D. 1880, conveyed nothing to said Central Trust Company, excepting only said unused grant of said city of Toledo.

VII. Your orators further aver that all the railroad, property, rights, and terminal facilities alleged to be conveyed by the said terminal trust mortgage were owned by and in the possession of and were being used by the said Toledo, Delphos and Burlington Rail-

road Company at the time of the execution of the said mortgage of January 17th, 1880, and at the time the said bonds held and represented by your orators were issued under said first mortgage or have been acquired by the said Toledo, Delphos and Burlington
60 Railroad Company and its successor, by consolidation, the Toledo, Cincinnati and St. Louis Railroad Company, since the execution of said first mortgage of January 17th, 1880, and are all subject to said mortgage as a first and paramount lien thereon.

Your orators would further show the court that since the execution of their said first mortgage, to wit, on or about the 9th day of September, 1880, the said Toledo, Delphos and Burlington Railroad Company bought of the city of Toledo a large and valuable tract of land in said city adjoining and adjacent to the right of way of said railroad, paying said city therefor the sum of $10,000.00, a more particular description of which said lands is as follows, to wit:

All that part of the lands known as the Manhattan Branch of the Miami and Erie canal, now abandoned, which are included and lie between Swan creek and Washington street, in the city of Toledo, Lucas county, State of Ohio, not heretofore sold, and especially excepting a certain part of said lands lying between Erie and Washington streets, as above deeded by the said city of Toledo, on the 10th day of March, A. D. 1880, to Mary Bodette; also excepting that portion of said described lands heretofore set apart for railroad purposes by the city of Toledo, by ordinance of the common council of the city of Toledo, passed October, A. D. 1879, and that said Toledo, Delphos and Burlington Railroad Company, by and through its agent, George William Ballou, made defendant hereto, purchased and acquired certain other valuable lands and rights in said city of Toledo; all of which your orators are not able to describe with particularity, but part of which are [is] described as follows:

The northeast 90 feet of the north half of lot 290, in the Port Lawrence division of the city of Toledo, Lucas county, Ohio,
61 being 30 feet front on Washington street and extending back in depth 90 feet; also that part of lot 17, river tract nine, township three, U. S. reserve, &c., described as commencing on the east line of river tract nine aforesaid, at a point 356 feet north from the center of South street of said city, running thence westerly and parallel with the said center of said South street to the southeast line of Canal avenue, extended; thence southwest along the southeast line of said Canal avenue, extended, to the west line of said lot 17; thence north along said west line to the Wabash and Erie canal; thence northeast along the line of the canal to the east line of said river tract nine; thence south along the said east line to the place of beginning, containing five and nine-tenths acres, more or less; also lots number 69 to 98, both inclusive, of the east South street addition to the city of Toledo, Lucas county, Ohio; also that part of lot number 15, in river tract ten, U. S. reserve, &c., between Miami and Erie canal and a line parallel thereto, 400 feet southeasterly therefrom, which said lands your orators aver are subject to the lien of their said mortgage of January 17th, 1880, as after-

acquired property of said Toledo, Delphos and Burlington Railroad Company.

Your orators would further aver that several other pieces of property of great value to said railroad company have since the execution of said mortgage of January 17th, 1880, been purchased or condemned or contracted for, to enable the said Toledo, Delphos and Burlington Railroad Company and its successor, the Toledo, Cincinnati and St. Louis Railroad Co., to extend its tracks to the navigable portion of the river in said city of Toledo; that your orators are unable to particularly describe said lands, rights of way, and privileges, but aver that the same are of great value, and that they are subject to the lien of the said mortgage of January 17th, 1880, as after-acquired property of said railroad company;

62 that your orators are informed and believe that the legal title to some of said lots and lands last above mentioned has been taken in the name of one George William Ballou, an officer or agent of said Toledo, Delphos and Burlington Railroad Company, and its successor by consolidation, the Toledo, Cincinnati and St. Louis Railroad Company, but that said lands so conveyed to said Ballou and of which he holds the legal title do in equity belong to and are the property of the said Toledo, Delphos and Burlington Railroad Company and its said successor by consolidation, the Toledo, Cincinnati and St. Louis Railroad Company, and are subject to your orators' said mortgage, the same being held only in trust by said Ballou; and your orators aver that a partial and the best description of which they are capable of said lands and rights, the title to which was taken and is held by Ballou in his own name and of which the said Toledo, Delphos and Burlington Railroad Company and its said successor by consolidation, the Toledo, Cincinnati and St. Louis Railroad Company, are the equitable owners, and which said lands your orators aver are held only in trust for said railroad companies by said Ballou and are subject to the said first mortgage of January 17th, 1880, is as follows, to wit:

(1.) Lots number- 65, 66, 67, and 68 of Shaw's and Wells' addition to the city of Toledo, Lucas Co., Ohio.

(2.) Lots 79, 80, 81, 82, 83, and 84 of Shaw's and Wells' 2nd addition to the city of Toledo, Lucas county, Ohio.

(3.) Also lots Nos. 8 and 9 of river tract No. 7, in the U. S. reserve of 12 miles square at the foot of the rapids of the Miami of Lake Erie, lying southeasterly of the right of way of the Toledo, Wabash and Western railway and running from said right of way to the channel of the Maumee river.

(4.) Being part of lot No. 36, lying on the northwest side of Sophia street and on the southeast side of Conant street, in

63 South Toledo, formerly Maumee City, more fully described as follows: Beginning at a point on the northwesterly side of Sophia street 117 feet southeast from the west corner of Sophia and Conant street; thence southwesterly along the northwesterly line of said Sophia street a distance of 348 feet, more or less, to the north corner of Sophia and Allen street; thence in a northwesterly direction along the northeasterly line of Allen street a distance of 200

and $\frac{8}{10}$ feet to a point; thence in a northwesterly direction along a line parallel with the center line of Sophia street a distance of 460 feet, more or less, to the southwesterly line of Conant street; thence in a southeasterly direction along the southwesterly line of Conant street a distance of $184\frac{8}{10}$ feet to a point; thence southwesterly parallel with the center line of Sophia street 117 feet to a point; thence southeasterly at right angles to the centre line of Sophia street a distance of 60 feet to the northwesterly line of Sophia street to the place of beginning, the whole containing $2\frac{1}{2}$ acres of land, more or less, situated in Lucas county, Ohio.

(5.) All that part of lot No. 17, in river tract No. 9, in the U. S. reserve of 12 miles square at the foot of the rapids of the Miami of Lake Erie, which lies between the track of the Wabash, St. Louis and Pacific railway and the Maumee river, all in the city of Toledo, Lucas county, Ohio, excepting all rights belonging and attached to said above-described lands in and to the reparian rights of the island in the Maumee river, which rights are reserved to the benefit of Isaac M. Poe, a former grantor of said lands.

(6.) All that portion of lot No. 15 in river tract No. 8, in the U. S. reserve of 12 miles square at the foot of the rapids of the Miami of Lake Erie, which lies between the land owned by the Toledo,
64 Wabash and Western Railway Company and the Maumee river, together with all the reparian rights belonging to the same, said land being situated in the city of Toledo, Lucas county, Ohio, the conveyances to which said lands and premises last above described and mentioned the said Ballou took in his own name and to himself as legal owner thereof while he was acting as the financial agent and trustee for the said Toledo, Delphos and Burlington Railroad Company and its successor, the Toledo, Cincinnati and St. Louis Railroad Company, without right and in violation of his duty and obligations as such financial agent and trustee aforesaid, all payments upon said land and premises being made by said Ballou out of funds belonging to said railroad company.

Your orators further show that they are informed and believe that the said Ballou and Margaret C. Ballou, his wife, on or about the 29th day of November, 1880, by a pretended mortgage or conveyance of some sort, pretended to convey certain of said property, of which he so held the legal title, to the Central Trust Company of New York for a consideration of $40,000.00, face value of said terminal bonds, but your orators aver that said transaction and said pretended mortgage were without authority of law and are invalid and void.

And your orators further aver that they are informed and believe that E. B. Phillips, Charles L. Luce, John T. Newton, Martha Stebbins, George Stebbins, and Thomas H. Hamilton are asserting and claiming some right or interest in some of the lands and property in said city of Toledo belonging to and equitably the property of the said Toledo, Delphos and Burlington Railroad Company and its successor, the Toledo, Cincinnati and St. Louis Railroad Com-
65 pany, and subject to said first mortgage of January 17th, 1880; therefore they are made defendants to answer as to any right or interest claimed by them or either of them.

VIII. Your orators would further show that after the execution of said mortgage of January 17th, 1880, by said Toledo, Delphos and Burlington Railroad Company upon its road and property extending from said city of Toledo, Ohio, to said city of Kokomo, Indiana, about $240,000.00 of the cash proceeds of the sale of said bonds issued under said first mortgage was expended in constructing what was called the "Kokomo Extension," which was the line of said railroad from the village of Warren, in the State of Indiana, to the city of Kokomo, in said State of Indiana; that said extension was so built and constructed with the cash proceeds of the sale of said first-mortgage bonds of said Toledo, Delphos and Burlington Railroad Company, but that the said line of railroad from Warren to Kokomo aforesaid was constructed under the franchises of a corporation of the State of Indiana known as the Frankfort, St. Louis and Toledo Railroad Company, which said last-named company was not taken into the consolidation forming the said Toledo, Delphos and Burlington Railroad Company; but your orators aver that on or about March 27th, 1880, the said Frankfort, St. Louis and Toledo Railroad Company made and entered into a contract with a building firm known as H. R. Low and Company for the building of its line of road between said village of Warren and said city of Kokomo, by the terms and considerations of which said contract the said H. R. Low and Company were to receive in full payment for the construction and equipment of said road (1) the local aid voted thereto by the municipalities along the line of said road and local contributions to the amount in the aggregate of four thousand dollars per mile; (2)
66 the first-mortgage bonds of said Frankfort, St. Louis and Toledo Railroad Company to the amount of six thousand dollars per mile; (3) eight hundred thousand dollars of the capital stock of said Frankfort, St. Louis and Toledo Railroad Company, the same being by the terms of said contract all of the capital stock thereof; that after making and entering into said contract with said Frankfort, St. Louis and Toledo Railroad Company the said contractors, H. R. Low and Company, under the firm name and style of A. G. Wells and Company, the parties in both firms being the same persons, entered into a contract on July 8th, 1880, with said Toledo, Delphos and Burlington Railroad Company for the building of the same line of road, to wit, from the village of Warren to the city of Kokomo, by the terms of which said contract the said Toledo, Delphos and Burlington Railroad Company agreed to pay to the said A. G. Wells and Company $5,000.00 per mile in cash for the construction of said railroad from Warren to Kokomo, and said Toledo, Delphos and Burlington Railroad Company, in addition to the said sum of $5,000.00 per mile to be paid in cash to said A. G. Wells and Company, further agreed that there should also be paid to said A. G. Wells and Company all local aid of any kind, but without indorsement or guaranty of the said Toledo, Delphos and Burlington Railroad Company to the said A. G. Wells and Company; and the said A. G. Wells and Company upon their part agreed, for said consideration to be paid to them, as above set forth, by the said Toledo, Delphos and Burlington Railroad Company, that they, the said A. G. Wells and Company, would

procure and vest in the said Toledo, Delphos and Burlington Railroad Company, by a good and indefeasible title, free from conditions or encumbrances, a right of way sixty (60) feet in width, thirty (30) feet on each side of the center line of the railroad, with such
67 additional widths as might be necessary for turnouts, sidings, transfers, depots, water stations, and burrow pits, which right of way said A. G. Wells and Company agreed should be thoroughly cleared of all standing timber, all brush, logs, useless timber, or rubbish of any kind should be burned up or removed, and all standing trees outside of the right of way that might endanger the track by falling should be chopped down; and said A. G. Wells and Company further agreed by their said contract to pay for and convey to the said Toledo, Delphos and Burlington Railroad Company depot grounds of such size and at such points as should be designated by the said railroad company, said depot grounds to be sufficient size and so located as to enable the company to do the business at the particular stations conveniently and well: Provided, however, That in towns and villages where said railroad should run through streets or alleys a right of way not less than sixteen feet (16) in width should be procured, the title thereto to be the best which the municipality and the adjacent owners could grant and free from conditions or requirements that would interfere with the safe, convenient, and economical operation of the railroad, said contract further providing that the said railroad should be built and constructed in a substantial and workmanlike manner, to be laid with iron rails of approved pattern, weighing forty (40) pounds to the lineal yard, joined with fish plates and bolts, said track to be laid with three thousand (3,000) ties to the mile, evenly spread at right angles to said track; that by their said contract the said A. G. Wells and Company, in addition to procuring and vesting in said Toledo, Delphos and Burlington Railroad Company the right of way, depot grounds, station grounds, and other real estate, and in addition to the procurement of all material and construction of said railroad, further contracted and agreed to deliver to said Toledo, Delphos and Burlington
68 Railroad Company all of the bonds issued by the Frankfort, St. Louis and Toledo Railroad Company and all of the capital stock of said Frankfort, St. Louis and Toledo Railroad Company, excepting only that paid for local aid, and agreeing that the amount of capital stock so delivered by said A. G. Wells and Company to the said Toledo, Delphos and Burlington Railroad Company should be above two-thirds of the total amount of capital stock issued by said Frankfort, St. Louis and Toledo Railroad Company; and said A. G. Wells and Company further, by their said contract and in consideration of the payments to be made to them by the said Toledo, Delphos and Burlington Railroad Company, agreed and contracted to pay and discharge all the liens and floating debt of said Frankfort, St. Louis and Toledo Railroad Company, so that when said railroad should be completed and delivered to said Toledo, Delphos and Burlington Railroad Company said Frankfort, St. Louis and Toledo Railroad Company should have no debts outstanding except only its said bonds delivered by said A. G. Wells and Company to

the said Toledo, Delphos and Burlington Railroad Company; and said A. G. Wells and Company further agreed to procure the directors of said Frankfort, St. Louis and Toledo Railroad Company one by one to resign, and that they would procure the election of a board of directors to be designated by the said Toledo, Delphos and Burlington Railroad Company or its board of directors or officers.

That said line of road between Warren and Kokomo was constructed by said A. G. Wells and Company under the said last-named contract between said A. G. Wells and Company and the Toledo, Delphos and Burlington Railroad Company.

69 And your orators are informed and so aver that the said A. G. Wells and Company did in all things comply with their said contract, and did pay off and satisfy all claims and floating debt against the said Frankfort, St. Louis and Toledo Railroad Company, and did deliver to said Toledo, Delphos and Burlington Railroad Company more than two-thirds of the capital stock issued by said Frankfort, St. Louis and Toledo Railroad Company, as by said contract required.

And your orators further aver that on or about the 17th of September, 1880, the said Frankfort, St. Louis and Toledo Railroad Company executed its mortgage for $264,000.00 to one Conrad N. Jordan as trustee, and caused the same to be duly recorded in the counties through which said line of railroad runs.

And your orators are informed and aver upon information and belief that only $90,000.00 of said bonds, so provided for by said mortgage, were ever issued, and that said $90,000.00 of bonds were issued to H. R. Low and Company under their said contract with the said Frankfort, St. Louis and Toledo Railroad Company, as hereinabove mentioned and described, and that the said A. G. Wells and Company, being the same persons as those composing the firm of H. R. Low and Company, did, under their said contract last above described, between them, the said A. G. Wells and Company and the Toledo, Delphos and Burlington Railroad Company, deliver to the proper officer of the said Toledo, Delphos and Burlington Railroad Company the said $90,000.00 of bonds issued by the said Frankfort, St. Louis and Toledo Railroad Company and delivered to them, which said bonds were so delivered by A. G. Wells and Company to the Toledo, Delphos and Burlington Railroad Company under and pursuant to their said contract, and that no other bonds were ever issued under the said Frankfort, St. Louis and Toledo Railroad Company first mortgage, as your orators are informed and believe.

70 And your orators further show the court that the said $90,000.00 of Frankfort, St. Louis and Toledo Railroad Company first-mortgage bonds issued and delivered to the said Toledo, Delphos and Burlington Railroad Company under said contract between said railroad company and said A. G. Wells and Company are now in the custody and possession of one Herbert Steward, of Boston, an officer of the Toledo, Delphos and Burlington Railroad Company, and of its successor, the Toledo, Cincinnati and St. Louis Railroad Company.

That said bonds so held by said Steward have never been issued by either the Toledo, Delphos and Burlington Railroad Company or by its successor, the Toledo, Cincinnati and St. Louis Railroad Company, but the same are and were held for cancellation, and your orators make the said Steward, as custodian and possessor of said $90,000.00 of bonds, defendant hereto, and asks the court that said bonds may be brought into court for cancellation.

And your orators would further show the court that afterwards and while the said Toledo, Delphos and Burlington Railroad Company held and owned two-thirds of the capital stock and all the bonds ever issued by the said Frankfort, St. Louis and Toledo Railroad Company, to wit, on the 25th day of February, A. D. 1882, the said Toledo, Delphos and Burlington Railroad Company and the said Frankfort, St. Louis and Toledo Railroad Company entered into a consolidation with the Toledo, Cincinnati and St. Louis Railroad Company of the States of Indiana and Illinois, forming by said consolidation the Toledo, Cincinnati and St. Louis Railroad Company.

And your orators aver that the said line of railroad from Warren to Kokomo was built and constructed with the proceeds arising from the sale of the bonds secured by the said first mortgage of the Toledo, Delphos and Burlington Railroad Company, executed
71 January 17th, 1880, and that the said corporate franchises of the said Toledo, Delphos and Burlington Railroad Company authorized the construction of a railroad from the said village of Warren to said city of Kokomo; and your orators aver that by reason of the facts herein set forth the said Toledo, Delphos and Burlington Railroad Company was, at the time of the last-mentioned consolidation, the legal owner of two-thirds of the capital stock of said Frankfort, St. Louis and Toledo Railroad Company and the legal and equitable owner of all the bonds ever authorized or issued by said Frankfort, St. Louis and Toledo Railroad Company, and was and is the legal and equitable owner of said line of railroad from said village of Warren to said city of Kokomo aforesaid, and of all and singular the right of way and all depot and station grounds and superstructures of and pertaining to said railroad, and that said line of railroad is subject to the said mortgage or trust deed of January 17th, 1880, as a first and paramount lien thereon.

Your orators further aver that they are informed and believe that since his appointment as receiver by the order of this court in this cause William J. Craig, as receiver, has purchased and taken in his own name as such receiver the legal title to certain lots and lands at and within the said city of Toledo for the purpose of providing right of way and grounds for said railroad to approach the river front in said city; and your orators aver that whatever lands have been so bought by said receiver are subject to the lien of the mortgage securing the bonds represented by your orators as a first and paramount lien.

Your orators further show the court that Robert Davidson, John Anderson, Jr., Charles Cameron, John Hauldworth, Louis Leislee, C. F. Bowie, C. H. Bonsfield, James King, P. Rolenberg, O. Dum-

mett, R. A. Mair, and Henry M. Leavitt, describing themselves
72 as holders of bonds issued under said Toledo, Delphos and Burlington Railroad Company terminal trust first mortgage, and as subjects of the Kingdom of Great Britain, as co-complainants with the Central trust Company of New York, as trustee in the terminal trust mortgage, have instituted a certain suit in equity in the United States circuit court for the northern district of Ohio, claiming and asserting that said Toledo, Delphos, and Burlington terminal trust first mortgage is a first lien and paramount to the lien of the said first mortgage of January 17th, 1880, securing the bonds represented by your orators upon all the line of railroad, rights, lands, property, and terminal facilities of the said Toledo, Delphos and Burlington Railroad Company at and within said city of Toledo, and are seeking to foreclose said terminal trust mortgage as a first and paramount lien upon said property, to the great injury and prejudice of your orators.

And your orators would further show the court that on or about October 20th, 1883, James Stevenson and Jeremiah Dummett, as bondholders holding bonds issued under the said Toledo, Delphos and Burlington terminal trust first mortgage, filed in said United States circuit court for the northern district of Ohio their said bill in equity against the Toledo, Delphos and Burlington Railroad Company, the Central Trust Company of New York, and the Toledo, Cincinnati and St. Louis Railroad Company, by which said bill said bondholders, Stevenson and Dummett, whose citizenship is to your orators unknown, are claiming and asserting that said terminal trust mortgage is a first lien upon the property and terminal facilities of the said Toledo, Delphos and Burlington Railroad Company at and within said city of Toledo, which said cause has been consolidated with the said suit of said The Central Trust Company of New York to foreclose said terminal trust mortgage.

73 And your orators further show the court that at the time said two suits last hereinabove mentioned were brought all of the railroad and property of the Toledo, Cincinnati and St. Louis Railroad Company, successor by consolidation to the Toledo, Delphos and Burlington Railroad Company, was in the possession and under the control and was being operated by a receiver appointed by this court under a bill in equity filed in this court on the first day of August, 1883, by Granville D. Branam against the said The Toledo, Cincinnati and St. Louis Railroad Company and The Toledo, Delphos & Burlington Railroad Company and others; and your orators would further show that while said railroad and property was so in the possession and under the jurisdiction and control of this court by its receiver appointed in said suit by Branam, to wit, on the 20th day of October, 1883, the Central Trust Company of New York, as trustee of the Toledo, Delphos and Burlington Railroad Company trust mortgage, dated January 17th, 1880, filed its original bill for the foreclosure of said first mortgage, to which said bill this is an amendment, filed by leave of court granted to your orators, who have been, by proper order of court, made co-complainants with said Central Trust Company of New York in said original bill; and

your orators would further show that under said last-mentioned cause and under the bill filed therein by said The Central Trust Company William J. Craig was appointed receiver of all of the said railroad and property covered by said mortgage of January 17th, 1880, and is now in possession thereof as such receiver.

IX. Wherefore and inasmuch as your orators are without remedy at law as to the matters and facts above set forth your orators file this their amendment to the said original bill of the said
74 Central Trust Company of New York, filed October 20th, 1883; and your orators pray that the said George William Ballou and Margaret Ballou, his wife, and the said Robert Davidson, John Anderson, Jr., Charles Cameron, John Hauldesnod, Louis Leisler, C. F. Bowie, C. H. Bonefield, James King, P. Rottenberg, O. Dummett, R. A. Mair, Henry M. Leavitt, James Stevenson, Jeremiah Dummett, E. B. Phillips, Charles Luce, John T. Newton, Martha Stebbins, George Stebbins, Thomas H. Hamilton, Herbert Steward, and the Central Trust Company of New York, as trustee of the Toledo, Delphos and Burlington Railroad Company terminal trust first mortgage and as grantee or mortgagee of George William Ballou and wife and as mortgagee of the Grand Rapids Railroad Company, may each and all of them be made defendants hereto; that process of subpœna may issue against each of them, and that they be required to make answer, respectively, to all and singular the allegations, charges, and averments in this amendment contained, but not under oath, answers under oath to this amendment being hereby specifically waived; that the said George William Ballou may be required to answer fully as to any interest he may claim in any lands and property in said city of Toledo, the title to which was taken by him in his own name, purchased and acquired since the consolidation forming the Toledo, Delphos and Burlington Railroad Company, said lands having been purchased for railroad uses and terminal facilities of said Toledo, Delphos and Burlington Railroad Company and its successors by consolidation, the said Toledo, Cincinnati and St. Louis Railroad Company; that the said Central Trust Company of New York may be required to make answer as to all the allegations and averments herein contained, and especially as to any right, title, or in-
75 terest it may have or claim to have in and to any lots and lands conveyed or mortgaged to it by George William Ballou and as to any consideration paid or delivered by said Central Trust Company for such mortgage or conveyance, and also as to any claim asserted by said Central Trust Company that said terminal trust mortgage is prior in lien to the said first mortgage of January 17th, 1880, securing the bonds represented by your orators; and inasmuch as Robert Davidson, John Anderson, Jr., Charles Cameron, John Hauldsworth, Louis Leisler, C. F. Bowie, C. H. Bonefield, James King, P. Rotterberg, O. Dummett, R. A. Mair, and Henry M. Leavitt represent themselves as being subjects of the Kingdom of Great Britain, your orators pray that if at any time said defendants or either of them come within the proper jurisdiction of this court and within reach of the process thereof that proper subpœnas may

issue and be served upon them or either of them so coming within the jurisdiction of this court.

And your orators pray that the said Toledo, Delphos and Burlington Railroad Company first mortgage, executed and dated January 17th, 1880, may be held and decreed to be a first and paramount lien upon all the property, railroad, tracks, buildings, superstructures, rights of way, lands, depot grounds, privileges, franchises, and all terminal facilities at and within the said city of Toledo that at any time belonged to or were acquired by the said Toledo and Maumee Narrow Gauge Railroad Company, and that belonged to or were acquired by the said Toledo, Delphos and Burlington Railroad Company and its successors by consolidation, the said Toledo, Cincinnati and St. Louis Railroad Company, and that said first mortgage of January 17th, 1880, may be held and decreed to be a lien upon said property superior and paramount to the lien of the said Toledo, Delphos and Burlington Railroad Company terminal trust first
76 mortgage dated June 21st, 1880, and executed July 1st, 1880; that the said Herbert Steward may be ordered to bring into court the said bonds issued by the Frankfort, St. Louis and Toledo Railroad Company; that said bonds may be cancelled and said mortgage decreed released and satisfied, and that said line of railroad from Warren to Kokomo may be decreed to be the property of the Toledo, Delphos and Burlington Railroad Company and subject to said mortgage of January 17th, 1880, as a first and paramount lien thereon; and your orators pray that the said first mortgage of January 17th, 1880, may be foreclosed by proper decree of this court and the said mortgaged property sold and the proceeds of sale applied to the payment of the bonds and coupons secured by said first mortgage of January 17th, 1880, as prayed by and in the said original bill of complaint, to which this is an amendment; and your orators pray for all such other and further relief as to the court shall seem to be just and according to equity and good conscience.

McDONALD, BUTLER AND MASON,
Solicitors for Complainants, James M. Quigley, Charles T. Harbeck, and John McNab.

And afterwards, to wit, on the 10th day of December, A. D. 1884, the following order was entered in this cause in said court, viz:

Order Appointing A. J. Ricks Spec. Master.

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

77 THE CENTRAL TRUST COMPANY OF NEW YORK, on Trenton Ave., Complainant,
vs.
THE TOLEDO, DELPHOS AND BURLINGTON RAILROAD COMPANY, Defendants.

In this —, on application of and by consent of counsel, the Hon. John Baxter, circuit judge, and the Hon. Martin Welker, district

judge, presiding, it is ordered that it be referred to A. J. Ricks, Esq., as special master, because of his experience in matters of such references, to inquire and state to the court as near as may be what specific property, describing the same with reasonable particularity, is embraced and included within the general descriptive terms of the mortgage or trust deed bearing date January 17th, 1880, set forth in the complaint made by the defendant, The Toledo, Delphos and Burlington Railroad Company, to the complainant, The Central Trust Company; and also what, if any, liens or claims there are upon the property in the pleadings described, and all questions of amounts and priority of said liens or claims, if any exist.

That the said master give notice of the time and place appointed by him for hearing under this order to the respective parties to this case, and that they respectively have leave to appear and be heard in the premises. It is further ordered that the master return and file with his report all the testimony and evidence that may be taken by him in the premises; and for the purposes of this reference said master is hereby vested with all the powers conferred upon masters in chancery by the 77th rule in equity of the Supreme Court of the U. S.

78 *Testimony of Thomas H. Hamilton.*

Mechanics' lien. Claim of T. B. Hamilton.

THOMAS H. HAMILTON, being duly sworn, testified in his own behalf as follows:

Direct examination by Mr. A. W. SCOTT:

Q. You are the Thomas H. Hamilton who is a defendant in this suit?

A. Yes, sir.

Q. Did you have a contract with the Toledo, Cincinnati and St. Louis Railroad Company for some work in this city?

A. Yes, sir.

Q. What was the nature of that work?

A. It was for docks constructed up here on the Maumee river.

Q. Was the contract a verbal one or in writing?

A. In writing.

Q. Will you look at this document and see if that is the contract which was executed by you and the company? (Hands witness papers.)

A. Yes, sir; these are the papers. I looked them all over yesterday.

Q. That is the contract?

A. Yes, sir.

(Said contract, including mechanics' lien in favor of Thomas Hamilton on the lands of George William Ballou and the Toledo, Cincinnati and St. Louis Railroad Company, endorsed: "Received for record August 30th, 1883, at 3.35 o'clock p. m. and recorded Sep-

tember 5th, 1883, in Vol. 5 of Liens, pages 155 to 164, inclusive.")
(Said papers are attached, marked Exhibit 85.)

Q. When was this work done for the railroad company—between what dates?

A. It was commenced some time in March and finished the forepart of August.

Q. How was the work estimated and by whom?

A. It was estimated monthly by the engineer.

Q. By the engineer of the company?

A. Railroad company.

Q. And were you paid upon such estimates?

A. Once.

79 Q. When payment was made?

A. When payment was made. I got the first estimate, $10,000.

Q. How much was paid on the contract and when?

A. Well, $15,000. The first estimate was $10,000 and the next estimate was $15,000. I got $5,000 of that. I got in all $15,000.

Q. Attached to Exhibit 85 is a statement of account. I will ask you to examine it and state whether it is a correct statement of account between you and the company at that date.

A. Yes, sir; that is a bill made up by my clerk and certified to by the auditor and Mr. Dwight.

Q. Who was Mr. Dwight?

A. He was general manager at that time.

Q. Is that a correct statement of the account due you at the present time with interest?

A. Yes, sir.

Q. Has there been any money paid you since this statement was made?

A. No, sir; I am sorry to say there has not.

Mr. PRATT:

Q. Can you state the date in March at which you commenced the work?

A. I think the contract shows that. I can refer to that and find out.

Q. If there is anything that you can show from the papers or otherwise it will save us looking for it. See if there is anything by which you can tell the date in March at which you commenced your work.

A. That is dated the 21st of March. I had ordered my timber a few days previous to that probably.

Q. Did you commence work immediately upon the execution of this contract?

A. Yes, sir.

(Mr. PRATT:)

Q. When did you complete the work?

A. I think we wound up there between the 15th and the 20th of August.

(Mr. SCOTT:)

Q. Was there any work done after the receiver was appointed to this road?

A. Yes, sir.

80 Q. Will you state how that was done—was it under this contract?

A. Yes, sir.

Q. At whose request?

A. Well, I went on there through the request, I believe, of Mr. Dwight; he and the vice-president was up there with me at the time. I showed them about what had to be done.

Q. What was the condition of the work when the receiver was appointed?

A. The work was in a very bad shape at the time; the work couldn't be left; it would have been a great loss to the property if it had been; at the time we had just commenced to throw dirt into it.

Q. What did you do after the receiver was appointed?

A. Went on and put in the balance of the timber and put in the filling; in fact, the filling had to be put in to hold it down.

Q. What would have been the effect if you hadn't done anything more after the receiver was appointed, on the balance of the work?

A. In case of a flood the last 450 feet would have gone down the river.

Q. You considered that necessary to preserve the work done before?

A. Yes, sir; we had a crib sunk at that time, and there wasn't any portion of it filled; the dock front was put in in two separate pieces—the dock front—and we had just got that nicely done, and there were no pockets filled at all.

(Mr. PRATT:)

Q. What other work was done after the receiver was appointed?

A. I couldn't state that; so far as my timber-work and the labor performed on it goes, it runs between fifteen and sixteen hundred dollars. There was no July estimate made; it was made up in August—the July estimate—and the engineers didn't give the amount of filling done; it was all bunched into August. I have no means of telling.

(Mr. SCOTT:)

81 Q. How many days' work were done after the appointment of the receiver?

A. The dredge was to work there about 15 or 16 days; part of the time one and part of the time two.

Q. All of the work that was done was done within fifteen days afterward?

A. Yes, sir.

(Mr. PRATT :)

Q. Is the property now so protected so that it is not likely to be carried out by the flood?

A. I have not visited the property but once since I quit there.

Q. At the time you quit there?

A. Yes, sir; it was. I should judge that the filling had settled some—washed down. I should say that the upper end required fixing to protect it in case of a heavy flood.

Q. Is there danger of the ice running in between the crib and the shore, and cutting it out in that way?

A. Yes, sir; for the lower end is not up, only level with the water; no chance to stop it from going through there.

Defendant Hamilton, further to manitain the issue on his part, called as a witness one EDWARD E. DWIGHT, who, first being duly sworn, testified as follows:

Testimony of E. E. Dwight.

Direct examination by Mr. SCOTT:

—. Were you connected with the Toledo, Cincinnati and St. Louis Railroad Company in the year 1883; and, if so, in what capacity?

A. I was appointed general manager of the T., C. and St. L. in the early part of April, 1883.

Q. How long did you remain in that position?

A. Until the receivership; the 1st of August.

Q. Were you the first receiver appointed by the court?

A. I was appointed receiver the 1st of August.

Q. While you were connected with the road were you constructing the dock on the Maumee river here in Toledo?

A. The work was in progress when I came here.

Q. Who was doing that work?

A. Mr. T. H. Hamilton.

Q. Was the work finished as far as it was finished while
82 you were in charge of the road?

A. Yes, sir.

Q. Were the estimates returned to you by your engineer?

A. The estimates were made by the engineer and voucher made by him and certified to, and afterward approved by me.

Q. Was the work done to the satisfaction of you and your engineer?

A. Yes, sir.

Q. And approved by you?

A. Yes, sir.

Q. Do you know the amount of money that was paid to him?

A. No; I don't. That is a matter of record. I don't recollect the figures.

Q. Do you know the amount of money that was received by him at the time he quit the work?

A. That I don't recollect. My impression is it was somewhere about $15,000.

Q. When the work was finished was it accepted by you for the company as satisfactory?

A. Yes, sir.

(Mr. PRATT:)

Q. Were you acting then for the company or as receiver?

A. Well, it will be a little difficult to answer that question. It was the tail end of the work. The work was practically finished about the 1st of August, and, as Mr. Hamilton stated a little while ago, the upper end of the crib had been placed in position, and it was necessary to fill it to hold it there. That work was done about the 1st of August. When the work was finished the engineer made an estimate covering the balance of the work, which I approved.

Q. You were appointed receiver about the 1st of August?

A. Yes, sir.

Q. Do you remember the date you were appointed receiver?

A. I think it was on the first—the 1st or 2nd.

Q. What time did you commence to be general manager?

A. Early in April—the 4th of April—my recollection is.

Q. The contract was entirely completed, was it—what was
83 provided in the contract?

A. Yes, sir; I think so. That is my recollection of it. The work as contemplated was not done. There was simply work enough done to protect the timber-work from being carried away. The plan was to carry the work further back and make the dock in rear of the timber-work, but there was only sufficient filling put in there to protect it from the ice and preserve it.

Q. And what was done after you were receiver was simply to preserve what had been done before?

A. Yes, sir.

Q. No separate voucher or estimate made of that work?

A. No, sir; it was all treated as one.

Defendant Hamilton, further to maintain the issues on his part, called as a witness one G. S. ANTHONY, who, being first duly sworn, testified as follows:

Testimony of G. S. Anthony.

Direct examination by Mr. SCOTT:

Q. What is your occupation?

A. I am acting as auditor for the receiver of the T., C. and St. L. railroad.

Q. How long have you occupied that position?

A. Well, since the beginning of the receivership, August, '83. Prior to that time I acted in the same capacity for the company.

Q. How long have you been auditor for the company?

A. Since the 19th of May, 1883.

Q. Were you auditor of the company at the time Mr. Hamilton was constructing a dock for the company here?

A. Yes, sir.
Q. What date was that, about?
A. The work had commenced before I came in as auditor, and I passed on all of his accounts.
Q. How were his accounts audited?
A. Monthly, on the estimates furnished me by the chief engineer.
Q. Have you a statement of the account as it now stands with Mr. Hamilton on your books?
A. Yes, sir.
Q. From your account what is the amount due him at the time when the work was finished?
A. $27,861.80.
84 Q. Does it correspond with his statement of account attached to this paper, which is called Exhibit No. 85?
A. Yes, sir; I have compared it.
Q. And your books show, then, that there was $27,861.80 due him on the 1st of August, 1883?
A. Yes, sir.
Q. Has there been any money paid to him on that account since?
A. No, sir.
Q. Or any payments made in any other way than by money?
A. No, sir.
Q. So far as your books show, that amount is still due him?
A. Yes, sir.

Mr. SCRIBNER:

Q. How much had been paid Mr. Hamilton on account of this work?
A. $15,113.08.
Q. When and by whom was that payment made?
A. That payment was made by the cashier of the company, Mr. Aikin.
Q. What company?
A. Of the T., C. and St. L. Railroad Company.
Q. Of course that was some time subsequent to the making of the contract?
A. Yes, sir.

Defendant Hamilton, further to maintain the issues on his part, called as a witness H. A. YOUNG, previously sworn, who testified as follows:

Testimony of H. A. Young.

Direct examination by Mr. SCOTT:

Q. Were you the engineer in charge of the work done by Mr. Hamilton on this dock?
A. Yes, sir; I made all the estimates on the work, except one.
Q. Were those estimates returned to the company?
A. They were.

Q. Do you know anything about the condition of his account with the company—how much is due him at present—do you know anything about that, of your own knowledge?

A. No, sir; I don't remember.

Q. Was the work done according to contract?

A. Yes, sir.

85 Q. Satisfactory to you as representative of the company?

A. Yes, sir.

Q. As far as you know, were the terms of the contract strictly complied with?

A. Yes, sir.

Q. And your estimates were approved by the company?

A. Approved by the chief engineer.

Defendant Hamilton, further to maintain the issues on his part, called as a witness one T. A. PHILLIPS, who, first being duly sworn, testified as follows:

Testimony of T. A. Phillips.

Direct examination by Mr. SCOTT:

Q. During the year 1883 were you connected with the Toledo, Cincinnati and St. Louis Railroad Company; and, if so, in what capacity?

A. Up to the 1st of March, 1883, I was the general manager.

Q. Was there any contract made for the construction of a dock on the Maumee river while you were in charge of the road?

A. I don't think the contract was closed up. I don't think it had been signed. By request of the president, Mr. Phillips, I asked Mr. Hamilton to put in a bid. I don't remember whether the bid was accepted and contract drawn up and signed before I left or not, but it was all arranged. There were other parties put in a bid at the same time.

Q. Were the negotiations with Mr. Hamilton conducted through you?

A. Yes, sir; partly through me. The matter was talked of between the president and myself, and I talked with Mr. Hamilton about it. The engineer was to get up the plans, and he was busy at them, if I recollect right.

Q. At whose suggestion was it that you went to Mr. Hamilton or to any one to get bidders for the construction of this dock?

A. E. B. Phillips, the president.

Q. Was Mr. Ballou connected with the road at that time—

86 George W. Ballou?

A. Yes, sir; I understood that he was. He came here and said that the dock must be built, and brought a civil engineer here by the name of Dwight—Jonathan Dwight—an expert, and Mr. Ballou and Mr. Dwight and myself went there the last time he was here and looked the ground all over, and Mr. Dwight decided where the dock should be placed.

Q. Was Mr. Ballou present when that was decided?

A. We talked it all over and looked the ground over, and when we came back to the office Mr. Ballou said that was the place. They wanted to put the dock on the company's grounds, so that they would have to buy as little property from other parties as possible. That was the idea Mr. Ballou had.

Q. Did Mr. Ballou speak of this particular tract as the company's grounds to you?

A. He did.

Q. Do you know whether Mr. Ballou was a director of the company at that time or not?

A. I don't know officially; it was my understanding that he was. I don't know officially that he was; but it was my understanding that he was a director all the time. We had to obey instructions—that is, so far as appointing officers. In one instance he ordered me to appoint a certain man as paymaster and assistant treasurer and it was done, and I understood, although I didn't know officially, that he was a director. It was my understanding that he was; but he had authority in some way—at least we recognized that he had authority.

Q. Was the dock finally constructed on the ground selected by Mr. Ballou and this engineer?

A. I don't know, sir; I left before it was done.

87 Q. With reference to the ground selected by Mr. Ballou and this chief engineer, where was it located?

A. It was located on land—ground—that I understood belonged to the company.

Q. I mean where is it located with reference to other parts of the road—what part of the river bank, if on the river bank, &c.?

A. It is the right-hand side as you go up the river on the river bank—that is, on the river.

Q. Do you know where the side track leading down to the river bank struck the river bank—do you know the location?

A. No, sir.

Q. How near it was to where that side track reaching down to the river bank would strike the river bank?

A. They had to go over private property getting to the river bank, striking their own land, and we were authorized to purchase that land.

Q. Do you know whether there was any change made from the first location made?

A. I don't know.

Q. You don't know that there was any change made?

A. No, sir; it was decided to go along this main street, and I got permission from the common council to go along. The work had to be done within a year.

Q. Do you know who the property was bought from that the dock was located upon by this engineer?

A. I can't remember now. Mr. Luce had charge of that. I authorized Mr. Luce to go ahead and negotiate for that property. There were several parties owned the property.

Q. After you and the engineer and Mr. Ballou had been up there and located the dock where did you go next?

A. We came down from the ice-houses up there; we didn't—when we were up there we walked over the ground far enough to see where the company's land was, and it was decided to put
88 the dock on the company's land and then to buy enough private property there and get permission from the city council to go along or over that street, and get just as little land as we could to reach the company's property. Where the dock was to be was out in the water; we didn't go out there. This was in the winter time and we were in a sleigh. When we went up there it was in February, some time. When we came back then we drove around considerably in coming down from the ice-house. We went around here and Mr. Ballou inquired about this belt road here, and was looking where this road comes in here that connects with the Grand Trunk road here, and that if he could get that thing started he would start a —; that he would issue bonds and could sell them if he could get this belt road started, and we came around here and went to the office.

Q. Did you receive any final instructions from any one as to the construction of this dock—whether to go ahead with it or not?

A. Mr. Ballou said there mustn't be any time lost in getting that dock built; it should be built and to lose no time in getting out the plans and putting the work out under contract; it should be built in time for the new crop coming on. This was in February.

Q. At the time you spoke to Mr. Martin in reference to this had there been any change of any kind as to its location as first selected?

A. No, sir.

Q. When you talked to him about building the dock, was this location the only location selected?

A. Yes, sir.

Q. Did you receive any instructions from the officers of the company as to how this work was to be paid for?

A. Mr. Phillips informed me that they had plenty of means
89 and it would be cash every month when the estimate was made. They would retain just what was usual and customary for the work to be finished. The balance would be cash. I so informed Mr. Hamilton. Mr. Hamilton asked me before he put in a bid if I knew the financial condition of the company, and I told him I didn't know only just what Mr. Phillips had told me—that they had plenty of money; that they had raised $800,000; there would be plenty of money to pay up promptly.

Q. Who did he represent had the money?

A. Subscribed by parties in Boston.

Q. There are so many companies and people, you may tell who it was.

A. The Toledo, Cincinnati and St. Louis.

Q. E. B. Phillips represented this, the president of the company at that time?

A. Yes, sir. Mr. Phillips informed me when he came out here he only accepted the presidency with the understanding that this

$800,000 should be raised, and should be expended where it would do the most good here, for bringing the property out and increase the facilities, and he thought —; we had walked this Swan creek all over two or three times to look where the best place was to put this dock, and they decided that they would have to have a dock in order to have a place for grain. Ballou decided to have it up on the company's property. Mr. Phillips wanted it on the old King dock down here, but how in the world they were going to get down there was the question. We had no money; we went that all over time and time again. When Ballou came and brought that man Dwight as an expert he decided it must be put on that property, and we got that man—what do you call him—to get the
90 ground; over that track (indicating) and come down over that track (indicating).

Q. That was named?

A. Yes, sir.

Q. Right of way for property above the water-works was obtained?

A. That Mr. Luce obtained; I don't know anything about it.

Q. You hadn't anything to do with that?

A. No; I left before that.

Q. They were in process of negotiation when you left?

A. Yes, sir.

T. H. Hamilton, further to maintain the issues on his part, called as a witness JAMES IRVINE, previously sworn, who testified as follows:

Testimony of James Irvine.

Direct examination by Mr. SCOTT:

Q. What day did your official relations with the railroad company cease?

A. I remained a director of the company until some time during 1881, later in the year, but I resigned all active connection with the company's affairs in February, 1881.

Q. You still remained as a director after that?

A. Yes, sir.

Q. Until the fall of 1881, probably?

A. I can tell pretty near; I think it was up until the consolidating with the Dayton and Southeastern railroad.

Q. You were a director up to April 12, 1881?

A. Yes, sir.

Q. Did you resign at that time?

A. There was a consolidation between the Dayton and Southeastern and the Toledo, Delphos and Burlington Railroad Companies and new directors were elected following the consolidation, at which I was not elected. I had resigned as vice-president and director, but my resignation hadn't been accepted up to that day.

Q. Prior to this time had the railroad company purchased any river front?

A. No, sir; I wouldn't say prior to April 12th, but prior to my resignation they hadn't purchased any.

Q. Between the time of your duties as financial manager here and the time that you absolutely finished your official duties had they purchased any river-front property that you know of?

A. No, sir; they had not. I laid out that whole idea of purchasing that river-front property there, and at the time I went away I had Mr. Ballou's consent to purchase that whole property along there and to go ahead and construct docks and complete terminal property for the railroad company, he to be reimbursed by another terminal trust, series B, but nothing had been done on it up to the time I resigned my position.

Q. Have you any knowledge of what has been done since you resigned?

A. No; nothing except by hearsay.

Q. This scheme, then, of a river front here and the dock was one that originated with you?

A. Yes, sir.

Q. What was the plan as contemplated?

A. Mr. Ballou was to advance the money to buy half a mile of river front extending from the Wabash river-front grounds up the river for about half a mile, near the water-works, as I recollect it, and purchase the right of way, so that a track could be run down through the City park and Park avenue, across the Wabash road and Broadway, and running down onto the grounds, constructing the necessary docks and elevators for a good river-front terminal property, and then he was to be reimbursed out of a new set of terminal trust bonds to be secured on this terminal property.

Q. Were these new terminal bonds executed, that you know of?

A. No; I do not.

Q. Do you know whether they were or not?

A. So far as I have any knowledge at all, they were not. I agreed with Mr. Ballou—they felt very hard at my leaving the company. One of the things they grieved about, I had planned these things all out; I had hold of the ropes about this property; I had made estimates of what it would cost and what I could do it for, and now I was leaving this service, and leaving it to somebody else. I agreed to come up and attend to that business for them free of charge if they wanted me to do it, but they never requested me to do it.

Q. Do you remember the names of any of the owners of the property?

A. Yes, sir.

Q. Do you know whether the lands of I. N. Poe were included?

A. Yes, sir; Wells' and George Stebbins'.

Q. The names I have mentioned to you?

A. Yes, sir.

Q. That property, at the time you left; its purchase was contemplated for dock property—river front?

A. Yes, sir; a few that I had priced. I had an intimation of

what I could buy it for. It hadn't become known outside of old Mr. Wells and George Stebbins what I was — at all. I worked around through different parties and I had an opportunity to buy that property very cheap. Mr. Earl lived in Brooklyn and I negotiated for his through different parties—all through—one way and another—different real estate, different people.

Q. As to their final purchase and how they were paid for, you don't know?

A. No, sir; only by hearsay. I have heard about it since.

Q. Was Mr. Ballou a director at that time?

A. Yes, sir.

Q. Was he a director at the time you resigned?

A. Yes, sir.

Q. Was he made a director of the reorganized company at the time you left it?

A. I can't tell you. I think he was. I think he was also a director. I think the books show that.

Mr. SCRIBNER:

Q. This new series of bonds, what was it intended to pay with this new series of terminal bonds; what was it intended to use the bonds for?

A. For the purchase and construction of the river-front
93 dock property down there.

Q. For the purchase of property for dock purposes on the river front?

A. I might say, to put it plainly, for purpose of *of* the construction and improvement of that river-front terminal property.

Q. Did that include the purchase of the property?

A. Yes, sir; the whole thing.

Q. Clear on down to Washington street?

A. No; it included this Maumee river and is laid out on this plat, Exhibit No. 10.

Q. What parts of the purchase were included in that scheme of purchase?

A. I don't know as that was definitely marked. He had got up the right of way through what we call the city and Park avenue. I undertake to say that at that time, if we had gone to the city council with the proposition to improve this property down on the river front, that they would have given us permission to go across Broadway street and give us the right of way across the city waterworks front. I think they would have done it; I have no doubt about it.

Q. You got them to do it?

A. Mr. Butler failed on it, because he acted very foolishly.

Q. I simply want you to state definitely what was proposed to pay or the proposed use of the second terminal bond issue B.

A. Of course, primarily, Mr. Ballou was to furnish the money to build the track and to build the whole thing, and we were to put a series of bonds on there large enough to pay him.

Q. You called your terminal bonds——

A. Second mortgage series B.
Q. Second mortgage?
A. Not a second mortgage—Toledo, Ohio, terminal trust, series B; but the first mortgage would be in Ballou.
Q. You had provided for one terminal trust?
A. Yes, sir.
Q. I understand that the scheme contemplated another——
A. Another; series B.
Q. I say I want to know what was contemplated to be embraced in that series B?
A. This river-front terminal property, as shown on Exhibit 10.

Mr. Pratt:

Q. It had nothing to do with the other terminals about which your former testimony has been given?
A. No, sir.

Mr. Scribner:

Q. What do you understand to be the other terminals in relation to which you have been giving testimony?
A. I will let you find that out.
Q. What particular part of the property?
A. I have told you all I know about it. It certainly does not extend that part of the property belonging to the Toledo, Delphos and Burlington Railroad Company beginning at the city limits—the western city limits—and running along its line of railroad down to its depot at Erie street and on down across Erie street and down Washington street to Swan creek, and the different depot grounds and shop grounds and tracks, and so on, laying adjacent to that main track.
Q. Didn't embrace, however, this dock property that you are speaking of?
A. No, sir.
Q. I simply inquire: You are testifying about the character of this second terminal trust?
A. My recollection is at the very time I wrote this we contemplated this.
Q. It follows the line right straight from the foot of Washington street right out to the city limits?
A. That is what I think.

Mr. Pratt:

Q. This line that you have just described is the one that is on Exhibit 9?
A. Yes, sir; that is the property; that is the property that is covered by series A, terminal trust.
Q. The one intended to be covered by it, at least?
A. Yes, sir; intended to be covered by it.

Mr. Scott: I offer in evidence so much of the record of the proceedings of the Toledo, Delphos and Burlington Rail-

road Company as is found on page 247 and following, providing for the issue of terminal trust bonds, series B, reading as follows:

"The following resolution was then offered by Milton Taylor and seconded by G. W. Kneisly:

"Resolved, first, That this company, for the purpose of borrowing money to locate, construct, and equip its proposed line of railroad by buying the right of way grounds hereinafter described and improving the same, — it is necessary and expedient to prepare, issue, and negotiate a series of two hundred and fifty first-mortgage Toledo terminal trust bonds of $1,000 each, bearing six per cent. interest, payable semi-annually, the principal to become due July 1st, 1911, both principal and interest to be payable in lawful money of the United States, and that the president shall forthwith cause to be prepared, engraved, and printed in the usual form such series of bonds, and, after he and the secretary shall have signed the name [same] and affixed the company's seal thereto, shall negotiate, issue, and sell the same, as ordered by this board or the executive committee.

"Second. That, in order to secure the payment of said issue of terminal trust bonds and the interest thereon, the president shall also forthwith cause to be prepared, in the usual form and duly executed, a mortgage deed of trust, conveying to the Central Trust Company of New York, as trustee, all the real and personal property of this company and its franchises and income appertaining to all the company's present and future to be acquired right of way and line of railroad and lands in the city of Toledo, Ohio, beginning at a point on the main track of the Toledo, Delphos and Burlington
96 railroad, on the west line of what is known as the City Park, in the city of Toledo, Lucas county, Ohio; thence with said right of way and to the full width thereof through said City Park to Broadway street; thence easterly with said right of way along and across Broadway to what is known as the Wells property; thence with said right of way through said Wells property to the city water-works grounds; thence through said water-works grounds to the east line thereof; thence with a width of 400 feet along the river front and channel of the Maumee river eastwardly a distance of 2,800 feet, more or less, to the east line of the Wabash Elevators Company's property, together with all the docks, improvements, appurtenances, and riparian rights, not including island rights, excepting, however, from the above-described strip of land the premises which may hereafter be used and occupied by the Toledo and St. Louis Elevator Company, being not to exceed 300 feet front on said river and extending back by parallel lines the full 400 feet depth of said strip of ground, and including all the present and future to be acquired lands in said city between said points for terminal facilities of all kinds, depots, stations, engine-houses, workhouses, and any and all other purposes, and all buildings and facilities and appurtenances thereon.

"Third. That the above proposition be submitted to the stockholders of the company at a meeting to be held at its general offices, in the city of Toledo, Ohio, on Monday, May 16th, 1881, at 11 o'clock and that the secretary give the notice of such meeting, as required a. m.,

by the statute, and if the execution of said bonds and mortgage and the issuing and negotiation of said bonds be then authorized by the holders of a majority of the shares of stock of said company, then the president and secretary, respectively, are authorized and required to execute and deliver said bonds and deed of trust
97 and to affix the seal of the company thereto and place the same on record in the proper counties.

"On roll of the roll the resolution was unanimously adopted."

Also so much of the record as is found on page 209 and following, further providing for the Toledo terminal trust bonds, series B, reading as follows, said proceedings being the action of stockholders:

"On motion of R. G. Butler, seconded by Herbert Steward, it was—

"Resolved by the stockholders of the Toledo, Delphos and Burlington Railroad Company, duly assembled, according to law, for such purpose, the holders of a majority of the stock upon which they would be entitled to vote at an election of directors of said company, being a majority of the stock upon which all instalments called for have been paid, consenting, That we do hereby direct and authorize the president and directors of such corporation, for the purpose of borrowing money to locate, construct, and equip its proposed line of railroad by buying the right of way grounds hereinafter described and improving the same, to prepare, execute, and issue a series of ten hundred and fifty bonds of one thousand dollars each, dated May 10th, 1882, bearing six per cent. interest, payable semi-annually, the principal to become due July 1, 1911, both principal and interest to be payable in lawful money of the United States.

"Such bonds shall also provide for the payment of such interest thereon as may from time to time become due, and shall be secured by mortgage or deed of trust upon all the property, real and personal, of this company on its franchises and income appertaining to all the company's present and future to be acquired right
98 of way and line of railroad and lands in the city of Toledo, Ohio, beginning at a point on the main track of the Toledo, Delphos and Burlington railroad, on the west line of what is known as the City Park, in the city of Toledo, Lucas county, Ohio; thence with said right of way and to the full width thereof through said City Park to Broadway street; thence easterly with said right of way along and across Broadway to what is known as the Wells property; thence with said right of way through said Wells' property to the city water-works grounds; thence through said water-works grounds to the east line thereof; thence, with a width of 400 feet, along the river front and channel of the Maumee river easterly a distance of 2,500 feet, more or less, to the west line of the Wabash Elevator Company's property, together with all the docks, improvements, appurtenances, and riparian rights—not including inland rights—excepting, however, from the above-described strip of ground the premises which may hereafter be used and occupied by the Toledo and St. Louis Elevator Company, being

not to exceed 300 feet front on said river and extending back by parallel lines the full 400 feet depth of said strip of land, and including all the present and future to be acquired land in said city, between said points, for terminal facilities of all kinds, depots, stations, engine-houses, work houses, and any and all other purposes, and all buildings and facilities and appurtenances thereon.

"Said bonds and mortgages to be drawn in such form and to such trustees as the board of directors or president may designate.

"The chairman appointed John M. Corse and R. G. Butler judges and tellers, and, action being taken, the chairman declared the resolution carried by the following vote:

"Votes cast in favor of the resolution, 77,440 shares.

"Votes cast against the resolution, none."

EXHIBIT No. 85.

The Toledo, Cincinnati and St. Louis R. R. Co. *vs.* T. H. Hamilton, Toledo, Ohio, Dr.

"EXHIBIT A."

1883.

July.	For 500 lin. ft. crib dock, @ $31½		$15,750 00		
	" 70 " " " 13		910 00		
	" 267 " " " 10¼		2,736 75		
	" 455 " " " 14½		6,597 50		
	" 5,970 " piling " " 18c.		1,074 60		
	" 994 lbs. anchor rings, " 12c.		119 28		
	" 263 " wro't iron, extra, @ 5c.		13 15		
	" 61 " cast washers, " 4c.		2 44		
	" excavating from channel, 70,348 cu. yds., 21c.		14,773 08		
	" excavating under cribs, 6,283 cu. yds., 15c.		942 45		
	" excavating under cribs, 445 cu. yds., 12½c.		55 63		
					42,974 88

Less am't vouchered as follows:

April voucher, No. 435		10,113 08		
May " " 221		6,451 16		
" " " 222		688 61		
" " " 237		2,455 35		
June " " 170		10,309 87		
				30,018 07
Balance due				12,956 81

There is due and unpaid the following am'ts:

May voucher, #221	6,451 16	
Less advance	1,856 04	
		4,595 12
June voucher		10,209 87
This "		12,956 81
		27,861 80

I certify the above statement is correct.
Toledo, O., Aug. 23, 1882.

C. S. ANTHONY, *Auditor.*

Approved:
E. E. DWIGHT.

102 STATE OF OHIO, } ss:
Lucas County, }

August 29th, A. D. 1882, Thomas H. Hamilton, being duly sworn, says that the account hereto annexed, marked "Exhibit A," is a true, just, and correct account of the labor performed and materials furnished by him to and for the said George Wm. Ballou and the Toledo, Cincinnati and St. Louis Railroad Company at said county, and that the prices thereof set forth in said account are just and reasonable, and that there remains due and unpaid thereon the sum of twenty-seven thousand eight hundred and sixty-one dollars and eighty cents ($27,861 80); that said labor was performed and said materials were furnished at the time in said account mentioned under and by virtue of three written contracts between said Thomas H. Hamilton and said The Toledo, Cincinnati and St. Louis Railroad Company, dated, respectively, March 20th, 1882, May 9th, 1882, and June 2nd, 1882, copies of which contracts are hereto annexed, marked, respectively, "Exhibits B," "C," & "D;" that said contracts were made by said Thomas H. Hamilton with said The Toledo, Cincinnati and St. Louis R. R. Co. with the knowledge, consent, and at the instance of said George Wm. Ballou, who holds the legal title to the premises hereinafter described in trust for said The Toledo, Cincinnati and St. Louis Railroad Company; that said labor was performed and said materials were furnished in good faith for the purpose of constructing a crib dock or docks on certain lots or parcels of land described as follows:

102 1st. All that portion of lot numbered thirteen (13), in river tract numbered eight (8), in the United States reserve of twelve miles square, at the foot of the rapids of the Miami of Lake Erie, which lies between the land owned by the Toledo, Wabash and Western Railway Company and the Maumee river, together with all the riparian rights belonging to the same, said land being situated in the city of Toledo, county of Lucas and State of Ohio.

2nd. Also all that part of lot numbered seventeen (17), in river tract nine (9), in the United States reserve of twelve miles square, at the foot of the rapids of the Miami of Lake Erie, which lies between

the track of the Wabash, St. Louis and Pacific Railroad Company and the Maumee river, all in the city of Toledo, Lucas county and State of Ohio.

That at the time said contract was entered into and said labor was performed and said materials were furnished the said The Toledo, Cincinnati and St. Louis R'w'y Company was and still is the owner of said lands, the legal title to which is held by said George Wm. Ballou in trust for said railroad company, and that said labor was performed and said materials were furnished at the request of the said The Toledo, Cincinnati and St. Louis Railroad Company with the knowledge and consent of said Geo. Wm. Ballou.

And this affiant further says that said Thomas H. Hamilton is the legal owner of said claim. This affidavit is made to secure a building lien on said premises for the use and benefit of the said
103 Thomas H. Hamilton, by whom said work was done and materials were furnished within four months last past. The said Thomas H. Hamilton claims a lien in the premises.

THOS. H. HAMILTON.

Sworn to by said Thomas H. Hamilton before me and by him subscribed in my presence this 30th day of August, A. D. 1883.

[SEAL.] M. C. FOGARTY,
Notary Public, Lucas Co., O.

EXHIBIT B.

Specifications for Crib Dock and Dredging in the Maumee River, Toledo, Ohio, for the Toledo, Cincinnati and St. Louis R. R. Co.

"A."

Foundation for the crib to be dredged to a level bottom 2 feet deeper than the channel, with care that the structure shall settle to a true level and dock line.

Dimensions.

The crib to be 500 feet in length and 32 feet in width, and to be constructed according to the accompanying drawing. The grillage to rest two feet below the bottom of channel, sixteen feet deep, at the average h-ight of water, and to be secured in exact position by piles thoroughly driven.

Timber.

All timber above a level of two feet below the average height of water to be of white or burr oak, except that wall parallel to and ten (10) feet back from dock line may be of soft wood.

104 Quantity of timber.

All timber, both above and below the water line, to be of good, merchantable quality, free from splits, shakes, decay, rotten knots, and all other defects tending to impair durability and strength. Timber

to be truly and squarely sawed or hewn to all dimensions and to be of 32-feet lengths on dock wall and grillage.

Construction.

The structure to be well and squarely built and securely bolted, and before acceptance must be filled with dredged material.

Braces and floor.

The contractor will be responsible for the sufficiency of bracing until the structure is in place and secured. He will also be responsible for flooring sufficient to insure an even settlement.

Framing.

Framing must be done accurately and care be taken in handling framed timber not to chip off edges or split dovetails. In framing timber no stick must be cut so as to fall easily into place, but, on the contrary, each stick will be required to be mauled into place, and subject to foregoing paragraph.

Timbers of longitudinal and cross walls to be framed together with dovetail joints.

Bolting.

To prevent splitting while bolting timber must be bored to receive bolts. Boring to be slightly less than size of bolt.

Drift bolts.

All timbers to be bolted together with drift bolts ¾" by 15", not more than eight (8) feet apart.

105 Quality of iron.

All iron must be of best quality of wrought iron. Any bolts or spikes failing in driving for any cause must be replaced by the contractor.

Wall plank.

Plank walls to be secured by 30-penny nails not to be more than a foot apart.

Planking.

Planking of dock to be 3-inch thickness, firmly spiked.

Workmanship.

All work must be done in a workmanlike manner, strictly in conformity with plans and specifications or such modifications of same as may be made by the chief engineer or through his instructions to his assistant or inspector, in writing.

Specifications—dredging.

The work to be done consists of excavating a channel twenty-five feet wide from the Wabash dock on the Maumee river to the proposed dock of the Toledo, Cincinnati and St. Louis R. R. Co., and a channel two hundred feet in width and five hundred feet long opposite the latter dock, and to excavate a foundation for the crib dock about thirty-five feet wide and five hundred feet long and to a uniform depth of eighteen feet below average height of water.

All material excavated to be deposited in and back of the crib dock to a height of about six feet above average surface of water, extending as far towards the shore as the material dredged will fill to the required height. The uniform depth of channel is to be sixteen feet at average water. The amount of material excavated shall be determined by measurement in the fill. The precise location of work to be done shall be determined by engi-
106 neer of second party or his assistants.

Articles of agreement made and entered into 20th day of March, A. D. 1883, by and between Thomas H. Hamilton, of the city of Toledo, party of the first part, and The Toledo, Cincinnati and St. Louis Railroad Company, a corporation under and by virtue of the laws of the State of Ohio, party of the second part, witnesseth:

That said party of the first part, for and in consideration of the covenants and agreements hereinafter set out, contracts and agrees with said party of the second part to construct five hundred (500) feet, lineal measure, of crib dock, according to the plans and specifications hereto attached, marked "A," and made part hereof, on the north bank of the Maumee river, in the city of Toledo, and east of the Toledo water-works property, at such a place as the engineer in charge may direct, and do the dredging necessary to place and secure the same, and form a channel twenty-five feet wide at the base in said Maumee river from the upper or western end of said dock to the Wabash elevator No. 5 (five).

That all material furnished and work done under this contract shall, before being accepted, be subject to an inspection by an inspector appointed by the Toledo, Cincinnati and St. Louis Railroad Company, and such material or work as does not conform to the specifications set forth in this contract shall be rejected.

And the said first party further agrees to complete all said work according to said plans and specifications on or before the 30th day of June, A. D. 1883.

107 And the said second party, in consideration of the promises and covenants, agrees with said first party to pay for constructing said dock and excavating said channel the following prices, to wit:

Thirty-one and one-half dollars ($31.50) per linear foot for dock built, measured on the dock line.

Twenty-one cents (21c.) per cubic yard for all filling in crib and dock, and not taken from crib bottom.

Fifteen cents (15c.) per cubic yard, measured in the fill, for excavating crib bottom.

Eighteen cents (18c.) per lineal fo't for all elm piles driven in construction of dock.

Twelve cents (12c.) per pound for all anchor rings.

Said second party further agrees to set the necessary stakes, showing the dock line as well as the channel line extended from said dock to said Wabash elevator, and to establish and mark the dock levels for the use of said first party.

Said second party further agrees to have an estimate made on the first of each month of all timber, piles, and other materials put in place, and excavating and filling made during the previous month, and shall pay the contract price for the same on or before the 20th day of the month in which the estimate is made, less fifteen per cent. thereof, which amount is to be retained by said second party until said work is finished.

Said second party also agrees to have a final estimate made when said work is finished, and to fully pay for the same within thirty days after its said completion; final payment not to be made until the said party of the first part has first given a release from all claims and demands whatever growing out of this contract, 108 possessing clear evidence that all bills against his work are fully paid and discharged.

And it is also agreed that if in any event the party of the first part shall delay or fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of its contracts, then, in either case, the party of the second part shall have power to annul this contract by giving notice in writing to that effect to the party of the first part, and the party of the second part shall thereupon be authorized to enter upon and finish the work:

Provided, however, That if the party of the first part shall by freshets, ice, or other force or violence of elements and by no fault of his own be prevented either from commencing or completing the work or delivering materials at the time agreed upon in this contract, such additional time may in writing be allowed him for such commencement or completion as in the judgment of the second party shall be just and reasonable, but such allowance or extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date of such completion had been the date originally agreed upon; and it is further expressly understood and agreed that no claim whatever shall at any time be made upon the party of the second part for or on account of any extra work or material performed or furnished or alleged to have been performed or furnished unless under and by virtue of this contract and not expressly bargained for or specified therein, unless such extra work or material shall have been expressly required in writing by the party of the second part or its successor, the prices and 109 quantities thereof having been first agreed upon by the contracting parties and approved by the chief engineer of the Toledo, Cincinnati and St. Louis Railroad Company.

It is further understood and agreed between the parties hereto

that said first party shall retain possession of said dock and all the appurtenances thereto belonging until full and complete payment is made to him for the labor performed and material furnished thereon or secured to his satisfaction, and that he shall have a lien on all said property to secure to him the payment of the contract price for all said material and labor so furnished and performed by him.

In witness whereof the said parties to this contract have hereunto set their hands on the day and year first aforesaid.

T. H. HAMILTON.
THE TOLEDO, CINCINNATI AND ST. LOUIS R. R. CO.,
By E. B. PHILIPS, *President.*

"EXHIBIT C."

"B."

Specifications for Additional Crib-Work Adjacent to the Maumee River Dock of the Toledo, Cincinnati and St. Louis R. R. Company.

A length of seventy (70) feet and twelve (12) feet wide to be attached to the east end of crib now building, extending at right angles to it, the timbers above water line interlocking the two parts. This may be all of soft wood. A length of four hundred and fifty-five (455) feet and twelve feet wide, extending from the southwest corner of the crib now building in the direction of the approach
110 as it shall be located by the engineer of the Toledo, Cincinnati and St. Louis R. R. Co. This shall interlock with the timbers above the water line of the crib now building, grillage to rest on even bottom 16 feet below mean water level. All walls to extend 6 feet above that level. The front wall of crib-work to be built of 12-inch thickness and from one foot below mean water level of square white oak timber, as shall all cross-walls for that height. All other walls of eight inches thick. Cross-walls to be fifteen (15) feet apart.

Work and material shall be as specified in contract between same parties, dated Mar. 20th, 1883, where not otherwise mentioned in present specifications.

No dredged material shall be deposited for embankment between crib and shore until piles are there driven. Said embankment shall be six feet above mean water level, twelve feet wide on top, with slopes of 2 to 1, and follow the line given by the chief engineer of the party of the second part.

Articles of agreement made and entered into this 9th day of May, 1883, by and between Thomas H. Hamilton, of the city of Toledo, party of the first part, and The Toledo, Cincinnati and St. Louis Railroad Company, a corporation under and by virtue of the laws of the State of Ohio, party of the second part, witnesseth:

That said party of the first part, for and in consideration of the covenants and agreements hereinafter set out, contracts and agrees with the said party of the second part to construct five hundred (500)

feet, lineal measure, of crib dock, according to the specifications
hereto attached, marked "B," and made part hereof, on the
111 north bank of the Maumee river, in the city of Toledo, and
east of the Toledo water-works property, at such a place as the
engineer in charge may direct, and do the dredging necessary to
place, secure, and fill the same.

That all material furnished and work done under this contract, before being accepted, shall be subject to an inspection by an inspector appointed by the Toledo, Cincinnati and St. Louis Railroad Company, and such material or work that does not conform to the specifications set forth in this contract shall be rejected.

And the said first party further agrees to complete all said work according to said plans and specifications on or before the 15th day of July, A. D. 1883.

And the said second party, in consideration of the promises and covenants, agrees with said first party to pay for constructing said dock the following prices, to wit: Thirteen dollars ($13.00) per lineal foot for dock built, measured on the dock line when work is all of soft wood.

Fourteen and ½ ($14.50) dollars per lineal foot for dock built, measured on the dock line, when built of white oak from one foot below mean water level, front and cross walls.

Twenty-one cents (21c.) per cubic yard for all filling in crib not taken from crib bottom, when it shall be necessary to handle such material twice.

Fifteen cents (15c.) per cubic yard, measured in the fill, for excavating crib bottom when it shall be necessary to handle such material twice.

Twelve and one-half cents (12½c.) per cubic yard, measured in the fill, for dredging for foundations in filling crib or in forming approach embankment between crib and shore, where it may be necessary so.

112 Eighteen cents (18 cts.) per lineal foot for all elm piles driven in construction of dock.

Said second party further agrees to have an estimate made on the first of each month of all timber, piles, and other material put in place and excavating and filling made during the previous month, and shall pay the contract price for the same on or before the 20th day of the month in which the estimate is made, less 15 % thereof, which amount is to be retained by said second party until said work is finished.

Said second party also agrees to have a final estimate made when said work is finished, and to fully pay for the same within 30 days after its said completion, final payment not to be made until the said party of the first part has first given a release from all claims and demands whatever growing out of this contract, presenting clear evidence that all bills against his work are fully paid and discharged.

And it is also agreed that if in any event the party of the first part shall delay or fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then in either case the party of the second part shall have

power to annul this contract by giving notice in writing to that effect to the party of the first part, and the party of the second part shall thereupon be authorized to enter upon and finish the work: Provided, however, That if the party of the first part shall, by freshets, ice, or other force or violence of the elements and by no fault of his own, be prevented either from commencing or completing the work or delivering the material at the time agreed upon in this
113 contract, such additional time may, in writing, be allowed him for such commencement or completion as in the judgment of the second party shall be just and reasonable, but such allowance or extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date of such completion had been the date originally agreed upon.

And it is further expressly understood and agreed that no claim whatever shall at any time be made upon the party of the second part for or on account of any extra work or material performed or furnished, unless under or by virtue of this contract and not expressly bargained for or specified therein, unless such extra work or material shall have been expressly required, in writing, by the party of the second part or its successors, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the chief engineer of the Toledo, Cincinnati and St. Louis Railroad Company.

It is further understood and agreed between the parties hereto that said first party shall retain possession of said dock and all the appurtenances thereto belonging until full and complete payment is made to him for the labor performed and material furnished thereon or secured to his satisfaction, and that he shall have a lien on all said property to secure him the payment of the contract price for all said material and labor so furnished and performed by him.

In witness whereof the said parties to the contract have hereunto set their hands on the day and year first aforesaid.

T. H. HAMILTON.

114 THE TOLEDO, CINCINNATI AND ST. LOUIS R. R. CO.,

By E. E. DWIGHT, *General Manager.*

Witnesses:

H. A. YOUNG, W. A. LACQUEST, to E. E. D.

"EXHIBIT D."

"C."

Specifications for Additional Crib-Work Adjacent to the Maumee River Dock of The Toledo, Cincinnati and St. Louis R. R. Company.

A length of two hundred and sixty-seven (267) feet and twelve (12) feet wide to be attached to the piece of 70 feet now building on the east end of the 500-foot dock, and being an extension of the said sev-

outs feet toward the north shore of the Maumee river, the timbers above the water line interlocking the two parts.

This extension to have a grillage of 12" x 12" timber, and walls on the face to be 12" thick. All cross-walls and back wall to be 8 inches thick.

Grillage to rest on an even bottom twelve and one-half (12½) feet below average height of river. All walls to extend two feet above this average height of the river, making a total height of wall of fourteen and one-half (14½) feet.

This extension can be built entirely of soft wood; cross-walls to be fifteen (15) feet apart.

Work and materials shall be as specified in contract between same parties dated March 20th, 1882, when not otherwise mentioned in present specifications.

115 No dredge material shall be deposited for embankment between crib and shore until piles are there driven.

Article of agreement made and entered into this second day of June, 1882, by and between Thomas H. Hamilton, of the city of Toledo, party of the first part, and The Toledo, Cincinnati and St. Louis Railroad Company, a corporation under and by virtue of the laws of the State of Ohio, party of the second part, witnesseth:

That said party of the first part, for and in consideration of the covenants and agreements hereinafter set out, contracts and agrees with the said party of the second part to construct two hundred and sixty-seven (267) feet, lineal measure, of crib dock, according to the specifications hereto attached, marked "C," and made part hereof, on the north bank of the Maumee river, in the city of Toledo, and east of water-works property, at such a place as the engineer in charge may direct, and do the dredging necessary to place, secure, and fill the same.

That all material furnished and work done under this contract, before being accepted, shall be subject to an inspection by an inspector appointed by the Toledo, Cincinnati and St. Louis Railroad Company, and such material or work as does not conform to the specifications set forth in this contract shall be rejected.

And the said first party further agrees to complete all said work according to said plans and specifications on or before the 15th day of August, A. D. 1882.

And the said second party, in consideration of the promises and covenants, agrees with the said first party to pay for constructing said extension of crib-work the following prices, to wit: Ten dollars and twenty-five cents per linear foot ($10 25) for dock built, measured on the dock line.

116 Twenty-one cents (21 c.) per cubic yard for all filling in crib not taken from crib bottom, where it shall be necessary to handle such material twice.

Fifteen cents (15c.) per cubic yard, measured in the fill, for excavating cubic [crib] bottom, when it shall be necessary to handle such material twice.

Twelve and one-half cents (12½c.) per cubic yard, measured in the

fill, for dredging for foundation, in filling crib, and forming embankment behind crib, where it may be necessary to handle material only once.

Eighteen cents (18c.) per lineal foot for all elm piles driven in construction of dock.

Said second party further agrees to have an estimate made on the first of each month of all timber, piles, and other material put in place and excavation and filling made during the previous month, and shall pay the contract price for the same on or before the 20th day of the month in which the estimate is made, less 15% thereof, which amount is to be retained by said second party until said work is finished.

Said second party also agrees to have a final estimate made when said work is finished and to fully pay for the same within 30 days after its completion.

Final payment not to be made until the said party of the first part has first given a release from all claims and demands whatever growing out of this contract, presenting clear evidence that all bills against his work are fully paid and discharged; and it is also agreed that if in any event the party of the first part shall delay or fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either
117 case, the party of the second part shall have power to annul this contract by giving notice in writing to that effect to the party of the first part, and the party of the second part shall thereupon be authorized to enter upon and finish the work: Provided, however, That if the party of the first part shall, by freshets or other force or violence of the elements and by no fault of his own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time may, in writing, be allowed him for such commencement or completion as in the judgment of the second party shall be just and reasonable, but such allowance or extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date of such completion had been the date originally agreed upon; and it is further expressly understood and agreed that no claim whatever shall at any time be made upon the party of the second part for or on account of any extra work or material performed or furnished, unless under or by virtue of this contract and not expressly bargained for or specified therein, unless such extra work or material shall have been expressly required in writing by the party of the second part or its successors, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the chief engineer of the Toledo, Cincinnati and St. Louis Railroad Company. It is further understood and agreed between the parties hereto that said first party shall retain possession of said dock or crib work and all the appurtenances thereto belonging until full and complete payment
118 is made to him for the labor performed and material furnished thereon or secured to his satisfaction, and that he shall have

a lien on all said property to secure him the payment of the contract price for all said material and labor so furnished and performed by him.

In witness whereof the said parties to the contract have hereunto set their hands on the day and year first aforesaid.

TOLEDO, CINCINNATI AND
ST. LOUIS R. R. CO.,
By E. E. DWIGHT,
Gen'l Manager.
T. H. HAMILTON.

Witness:

And afterwards, to wit, on the 1st day of August, A. D. 1885, in pursuance to the order of reference heretofore given, A. J. Ricks, the special master therein appointed, filed his report upon the several matters covered by said reference. So much of said report as relates to the claim of Thomas H. Hamilton and all of said report concerning said claim is as follows, to wit:

119 *Claim of Thomas H. Hamilton in Master's Report.*

United States Circuit Court, Northern District of Ohio, Western Division.

THE CENTRAL TRUST CO. OF N. Y. *et. al.*
vs.
THE TOLEDO, DELPHOS AND BURLINGTON RAILROAD COMPANY *et al.*

On the 20th day of March, 1883, and on May 9th and June 2nd, 1883, the defendant, Thomas H. Hamilton, of the city of Toledo, made certain written contracts with the Toledo, Cincinnati and St. Louis Railroad Company for the construction of 500 feet of crib dock according to a plan and specifications agreed upon, said dock to be built upon the north bank of the Maumee river, in the city of Toledo, and east of the Toledo water works, said Hamilton to receive $31.50 per lineal foot for dock built, measured on the dock line. The work was completed as per contract and the amount found due the said Hamilton, by account agreed upon between him and the company, was $42,974.88. Payments were made on said sum so as to leave the balance due and unpaid $27,861.80, with interest from the 1st of September, 1883.

On the 30th day of August, 1883, Hamilton took the necessary proceedings, under the statutes of Ohio, to perfect and assert his lien for the labor performed and materials furnished under said contract as against the Toledo, Cincinnati and St. Louis Railroad Company.

In the affidavit required by law to make out his lien he swears that the contracts named above were made by the defendant
120 railroad with the knowledge, consent, and at the instance of Geo. W. Ballou, whom Hamilton alleged held the legal title. The affidavit, contract, specifications, and accounts of said Hamilton are filed, marked Exhibit 85, to which reference is made for further description of the property upon which the dock was constructed.

The evidence shows that said contracts were made with the Toledo, Cincinnati and St. Louis Railroad Company as the owner of the property upon which the dock was constructed, but fails to show that Ballou had any such knowledge thereof as to make him a party thereto or to estop him from controverting the claim or lien, and that said contracts were made subsequent to the mortgage of January 17th, 1880.

The docks were completed a few weeks before the appointment of a receiver. The work performed and materials furnished under this contract were essential to the completion of the railroad and to enable it to secure the grain freights of the West, for which it was largely constructed. Without such dock facilities it was believed by the officers of the company that it would not be able to do the business for which it was chiefly constructed. The property of the mortgagor has been appreciated in value by the amount of labor and supplies furnished by Hamilton. The labor and supplies for which this lien is claimed were therefore of such a character as, in my judgment, bring it within the class of claims which have been frequently recognized by the courts of Federal jurisdiction. As counsel for all parties in argument conceded the strong equities of this claimant and rather urged its recognition, if it could be protected by law, I report that said Hamilton has an equitable

121 lien upon said road-bed of the Toledo, Cincinnati and St. Louis railroad, as the successor of the Toledo, Delphos and Burlington Railroad Company, which should be paid prior to the bonds secured by the mortgage of January 17th, 1880. Under the laws of Ohio said lien is of the same character as a bridge or right-of-way lien and is a lien upon the entire road-bed of the mortgagor. The claim, with interest to August 1st, 1885, amounts to $31,005.80.

122 And afterwards, to wit, on the 3rd day of December, A. D. 1885, being a day of the December term of said court, the following decree was entered, Hon. John Baxter, circuit judge, presiding:

Decree.

United States Circuit Court, Northern District of Ohio, Western Division.

CENTRAL TRUST COMPANY OF NEW YORK *against* THE TOLEDO, DELPHOS AND BURLINGTON R. R. Co. *et al.* } In Equity. No. 382.

Entry.

This cause came on to be heard on the intervening petition of Thomas H. Hamilton; the answers of the several defendants thereto; the report therein of A. J. Ricks, as master commissioner; the exception to said report by George W. Ballou, insomuch as it refers to the claim of said Hamilton, and the evidence, and was submitted to the court; on consideration whereof the court find that the exceptions to the master's report filed by George W. Ballou, insomuch

as they refer to the claim of said Hamilton, are not well taken, and the same are herein overruled and the master's report is confirmed; and further find that there is due to said Thomas H. Hamilton from the defendant, The Toledo, Cincinnati and St. Louis Railroad Company, on account of the materials furnished and labor performed under the several contracts set forth in the said intervening petition of said Hamilton, the sum of twenty-seven thousand eight hundred and sixty-one and $\frac{80}{100}$ ($27,861.80) dollars, with interest thereon from the first day of August, A. D. 1883, at the rate of six per cent. per annum, and that the same is a lien, prior to all
123 other liens, upon the premises described in the petition, by reason of the mechanics' lien in said intervening petition described, and that said Thomas H. Hamilton is entitled to have said lien enforced. Said premises are described as follows, to wit:

First. All that part of lot numbered thirteen (13) in river tract number eight (8) in the United States reserve of twelve miles square at the foot of the rapids of the Miami of Lake Erie, which lies between the land owned by the Toledo, Wabash and Western Railroad Company and the Maumee river, together with all the reparian rights belonging to the same, said land being situated in the city of Toledo, county of Lucas and State of Ohio.

Second. All that part of lot numbered seventeen (17) in river tract numbered nine (9) of the United States reserve of twelve miles square at the foot of the rapids of the Miami of Lake Erie, which lies between the tracks of the Wabash, St. Louis and Pacific Railroad Company and the Maumee river, all in the city of Toledo, county of Lucas and State of Ohio; and it is further found by the court that said premises are part of the property of the said Toledo, Cincinnati and St. Louis Railroad Company, covered by the first mortgage of the Toledo, Delphos and Burlington Railroad Company, in this suit sought to be foreclosed, and as said property so covered by said mortgage, including the property upon which the lien aforesaid is found, will be sold as an entirety.

It is therefore considered by the court that the claimant, Thomas H. Hamilton, recover from the defendant, The Toledo, Cincinnati and St. Louis Railroad Company, the said sum of twenty-seven thousand eight hundred and sixty-one and $\frac{80}{100}$ ($27,861.80)
124 dollars, with interest thereon at the rate of six per cent. per annum from the first day of August, A. D. 1883, together with his costs herein expended; and that upon the sale of said property under said foreclosure proceedings, including the property upon which the lien aforesaid is found, so much of the proceeds thereof as may be necessary to satisfy the judgement and lien in favor of said Hamilton herein be applied thereto, and that such provision shall be included in any order of this court making distribution of the said fund arising from the sale of the premises under the said foreclosure proceedings. And the said The Toledo, Delphos and Burlington Railroad Company, The Toledo, Cincinnati and St. Louis Railroad Company, James M. Quigley, Charles T. Harbeck, and John McNab each and all here now except to the aforesaid order, finding, and decree in said Hamilton's behalf, and pray an appeal

to the Supreme Court, which is granted upon their giving a bond for costs, to the approval of the court, in the sum of one thousand dollars ($1,000).

And in the event of appeal the court hereby fixes the amount of the supersedeas bond, in case the same be given, at $40,000, the superseding to take effect from and after the approval and acceptance of said bond by the court.

125 And afterwards, to wit, on the ninth day of February, A. D. 1886, the following bond was filed in this cause, in said court, viz:

Know all men by these presents that we, James M. Quigley, Charles T. Harbeck, and John McNab, as principals, and Sylvester H. Kneeland and Charles L. Luce, as sureties, are held and firmly bound unto Thomas H. Hamilton in the sum of forty thousand dollars; to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this — day of February, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas the above-bounden James M. Quigley, Charles T. Harbeck, and John McNab have appealed to the Supreme Court of the United States *for the northern district of Ohio* from a decree of the circuit court of the United States for the northern district of Ohio, western division, bearing date the third day of December, A. D. 1885, in a cause wherein The Central Trust Company of New York, J. M. Quigley, Charles T. Harbeck, and John McNab were complainants and The Toledo, Delphos and Burlington Railroad Company and the said Thomas H. Hamilton and others were respondents:

Now, therefore, the condition of this obligation is such that if the above-named appellants, James M. Quigley, Charles T. Har-
126 beck, and John McNab, shall prosecute their appeal with effect and pay all such damages, costs, and expenses as shall be awarded against them as such appellants therein, and shall, moreover, pay the amount of costs and damages rendered and to be rendered in case the decree shall be affirmed in said Supreme Court, then this obligation to be void; otherwise to remain in full force and effect.

Sealed and delivered in presence of—

JAMES M. QUIGLEY &
CHARLES T. HARBECK AND JOHN McNAB, [SEAL.]
By CLARENCE BROWN, [SEAL.]
Their Attorney.
SYLVESTER H. KNEELAND & [SEAL.]
CHARLES L. LUCE. [SEAL.]

Signed as to Kneeland in presence of—
JOHN M. BUTLER.
As to Luce in presence of—
FRED'K L. GEDDES.

DISTRICT OF INDIANA, *ss:*

On this 8th day of February, A. D. 1886, before me, Noble C. Butler, clerk of the district court of the United States for the district aforesaid, personally came Sylvester H. Kneeland and acknowledged the execution of the foregoing instrument by him to be his voluntary act and deed.

Witness my hand and the seal of said court.

[Seal of the District Court of the United States for the District of Indiana.]

NOBLE C. BUTLER, *Clerk.*

NORTHERN DISTRICT OF OHIO, *The State of Ohio, Lucas County,* } *ss:*

I, Charles L. Luce, a resident of said county and State, do solemnly swear that, after paying my just debts and liabilities, I am
127 worth upwards of forty thousand dollars in real estate within the jurisdiction of the circuit court of the United States for the northern district of Ohio, western division, and subject to execution, levy, and sale.

CHARLES L. LUCE.

Sworn to and subscribed before me this ninth day of February, A. D. 1886.

[NOTARIAL SEAL.] FREDERICK L. GEDDES,
Notary Public, Lucas County, Ohio.

Endorsed: No. 382. In the cir. court of the United States for the northern district of Ohio, west. div. Central Trust Co. of N. Y. *et al. vs.* T., D. & B. R. R. Co. *et al.* Appeal bond on Hamilton decree. Filed Feb. 9, 1886. A. J. Ricks, clerk U. S. circuit court. The within bond is approved by me this 9 Feb'y, 1886. M. Welker, dist. judge N. dist. of Ohio.

128 *Certificate.*

UNITED STATES OF AMERICA, *Northern District of Ohio, Western Division,* } *ss:*

I, Augustus J. Ricks, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of so much of the record of the proceedings in said court in the cause wherein The Central Trust Company of New York is complainant and The Toledo, Delphos and Burlington Railroad Company and The Toledo, Cincinnati and St. Louis Railroad Company are defendants as relates to the claim and the decree entered thereon, based upon the intervening petition of Thomas H. Hamilton filed in said cause, as the same appears from the files and records of said court now remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Toledo, in said district, this 9th day of October, A. D. 1886, and in the — year of the Independence of the United States of America.

[Seal of the Circuit Court, North'n Dist. of Ohio.]

AUGUSTUS J. RICKS, *Clerk.*

129 The United States of America to Thomas H. Hamilton, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal allowed by the circuit court of the United States for northern district of Ohio, western division, at its December term, 1885, in a case wherein you are an intervening petitioner by allowance of the court, said case being The Central Trust Company of New York *vs.* The Toledo, Delphos & Burlington Railroad Co.; from said decree the Toledo, Cincinnati & St. Louis Railroad Company, as successor to Toledo, Delphos and Burlington R. R. Co., is appellant and you are appellee, to show cause, if any there be, why said decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Martin Welker, district judge and one of the judges of said circuit court, this 9th day of February, in the year of our Lord one thousand eight hundred and eighty-six.

M. WELKER,
Dist. Judge U. S., N. D. O.

130 [Endorsed:] U. S. cir. c't, N. D. O. No. 382. Cent. Trust Co. *et al. v.* T., D. & B. R. Co. *et al.* Citation. Filed Feb. 10, 1886. A. J. Ricks, clerk.

On this — day of ——, in the year of our Lord one thousand eight hundred and eighty- —, personally appeared —— ——, before me, the subscriber, —— ——, and makes oath that he delivered a true copy of the within citation to —— ——.

Sworn to and subscribed the ——, A. D. 188–.

—— ——.

I acknowledge service of the within by copy this 10th day of February, 1886.

A. W. SCOTT.

Endorsed on cover: N. Ohio C. C. U. S. No. 184. The Toledo, Delphos & Burlington Railroad Company, The Toledo, Cincinnati & St. Louis Railroad Company, James M. Quigley, Charles T. Harbeck, and John McNab, appellants, *vs.* Thomas H. Hamilton. Filed October 15, 1886.

In the Supreme Court of the United States.

THE TOLEDO, DELPHOS & BURLINGTON RAILROAD COMPANY *et al.*, Appellants,
vs.
THOMAS H. HAMILTON, Appellee.

Stipulation.

It is hereby stipulated that the record in this case in the circuit court shows the following, and that the same may be filed herein as an addition to the record already filed herein and be treated as a part of said record, to wit:

1. That Exhibit No. 2 of the proofs of the case is a certified copy of the articles of consolidation of the Toledo, Delphos & Burlington Railway Company filed in the office of the secretary of state of Ohio on May 7th, 1879, between the Toledo and Maumee Narrow-Gauge Railroad Company, the Toledo, Delphos and Indianapolis Railway Company, the Delphos & Kokomo Railway Company, the Delphos & Bluffton and the Frankfort Railroad Company, said articles of consolidation being in usual and due form under the consolidation laws of Ohio.

2. That Exhibit No. 3 of said proof is a certified copy of the articles of consolidation of the Toledo, Delphos & Burlington Railroad Company, filed in the office of secretary of state of Ohio on the 21st day of June, 1880, between the Toledo, Delphos and Burlington Company, as formerly constituted, and the Dayton, Covington and Toledo Railroad Company, said articles of consolidation being in the usual form and regular under the consolidation laws of the State of Ohio.

3. That Exhibit No. 4 of said proof is a certified copy of the articles of consolidation between the Toledo, Delphos & Burlington Railroad Company, as then constituted, and the Dayton and Southeastern Railroad Company, filed in the office of the secretary of the State of Ohio on the 18th day of March, 1881, said articles being in regular and due form under the consolidation laws of the State of Ohio.

4. That Exhibit 5 of said proof is a certified copy of the articles of consolidation between the Toledo, Delphos & Burlington Railroad Company, as then constituted, and the Frankfort, St. Louis and Toledo Railroad Company, a corporation of the State of Indiana, filed in the office of the secretary of state of the State of Ohio on March, 2, 1882. The name of the consolidated company by these articles of consolidation became the Toledo, Cincinnati and St. Louis Railroad Company.

5. That Exhibit No. 6 of said proofs is an amendment to the last-named articles of consolidation, filed with the secretary of state August 5, 1882, and the same being in due form of law.

6. That Exhibit No. 7 of said proof is a certified copy of the articles of consolidation between the Toledo, Cincinnati and St. Louis Railway Company, the Cincinnati Northern Railway Company, and the Spring Grove, Avondale and Cincinnati Railway Company, filed in the office of the secretary of state of the State of Ohio May 8, 1883, the corporation retaining the name of the Toledo, Cincinnati and St. Louis Railway Company, being in due form of law.

7. And Exhibits 1 & 8 are the articles of incorporation of the Toledo and Maumee Narrow-Gauge Railroad Company and the Toledo and Grand Rapids Railroad Compan*ies*, respectively, and dated May 16, 1873, and March 28, 1874, respectively.

8. That Exhibit No. 38 of said proof is a deed from Isaac N. Poe and wife to George Wm. Ballou, dated March 31, 1881, and conveying a part of the property on which the dock was built, which is the subject of Hamilton's claim, said deed being in the usual form under the laws of Ohio.

9. That Exhibit No. 39 of said proof is a deed from Robert Hunter and wife to George Wm. Ballou, dated April 2, 1881, conveying the other part of the property on which said dock was built, said deed being in the usual form under the laws of Ohio, and that both of said deeds are in form absolute conveyances to George Wm. Ballou and his heirs and assigns.

10. That the mechanic's lien of said Hamilton in proof in the case shows that the same was filed for record and recorded August 30, 1883, in the recorder's office, as provided by statute, the record printed herein failing to show the record of said lien.

11. That George Wm. Ballou filed an answer and cross-bill herein on the 13th day of February, 1885, in which he alleged that he held the legal title to the property on which said dock was located, but that the railroad company, as then constituted, was the equitable owner thereof, and that he was bound to convey it as soon as — railroad company reimbursed him for the purchase-money advanced by him.

And that he filed an amended answer and cross-bill on the 19th day of May, 1885, in which he alleged that he was the sole owner in fee simple of said property on which said docks were located, and that said railroad company had no interest therein.

12. That the map hereto attached is one of the exhibits in this cause, showing the lines of railroad of the Toledo, Delphos and Burlington Railroad Companies and the Toledo, Cincinnati and St. Louis Railroad Companies in the city of Toledo (here follows map marked p. 3), and that the following is the testimony of H. A. Young taken in this cause in 1884, so far as the same relates to the line of railroad to the dock constructed by Hamilton.

Q. Are you in any manner connected with the Toledo, Cincinnati and St. Louis Railroad Company—receiver's office?

A. Yes, sir.

Q. What position do you hold there?

A. As chief engineer.

Q. How long have you acted in that capacity?

A. As chief engineer, since first of December last year.

Q. And were you in the engineer's office before that time?

A. Yes, sir.

Q. How long had you been connected with the office before you became chief engineer?

A. For about a year before that I was acting chief engineer, and previous to that time I was first assistant. I came into the employ of the company in October, 1882.

Q. Been in the employ of the company ever since, have you?

A. Yes, sir.

Q. Have you prepared maps showing the lines of the Toledo, Cincinnati and St. Louis Railroad Company, as at present constituted, within the city of Toledo?

A. Yes, sir.

Q. Will you produce them?

(Witness produces maps.) A. These are the tracings of the maps so prepared.

* * * * * * *

Q. And the map now shown you—of what is that a tracing?

A. This is a tracing of Marston's map of the city of Toledo, made in 1875, and shows the relative positions of the main line and the line to the dock.

(Attached, offered in evidence, and marked Exhibit No. 11.)

Q. You may state whether these maps or tracings are correct, substantially.

A. They are substantially correct.

Q. Showing the line of railway through the city?

A. Yes, sir.

* * * * * * *

Q. How is the line from Park avenue marked "Line from dock?" Is that a constructed road?

A. The line from the corner of Park avenue and Broadway to the dock is simply staked out by survey, and has never been constructed.

Q. Where does that line end?

A. At the corner of Broadway and Park avenue, where the line named "Line to dock" separates from the line named "Toledo and Maumee Narrow Gauge."

Q. Then, taking the line between that dock and Park avenue, there is no constructed line of road?

A. Nothing excepting a short piece of trestle-work on the water-works property which has never been completed.

These matters and things being those referred to in the motion [illegible] filed by the appellee, it is stipulated that instead of filing and

printing the originals that the above facts be taken as a sufficient statement of their contents for the purposes of this appeal.

JOHN H. DOYLE,
Sol'r for Hamilton.
CLARENCE BROWN,
Sol'r for Appellants.

[Endorsed:] Supreme Court U. S. 1889, October term. No. 184. The Toledo, Delphos & Burlington R. R. Co. *et al.*, app'ts, *vs.* Thomas H. Hamilton. Stipulation & addition to record. Filed Dec'r 12, 1889.

SUPREME COURT U. S.
FILED.
DEC. 2 1889
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 184.

THE TOLEDO, DELPHOS AND BURLINGTON RAILROAD COMPANY ET AL., APPELLANTS,

vs.

THOMAS H. HAMILTON, APPELLEE.

Motion

And now comes Thomas H. Hamilton, appellee herein, and moves the Court that appellants be required to complete the transcript of the record in this case by filing in this Court copies of the following papers omitted from the transcript of the record heretofore filed herein, to wit:

1st. The answer and cross-petition of Geo. W. Ballou, filed February 13, 1885.

2d. The amended answer and cross-petition of Geo. W. Ballou, filed May 19, 1885.

3d. Deed from Rob't Hunter to Geo. W. Ballou, Exhibit No. 39 in the court below.

4th. Deed from I. N. Poe to Geo. W. Ballou, Exhibit No. 38 in the court below.

5th. A correct and true copy of Hamilton's mechanic's lien, showing the endorsement of the county recorder certifying as to the date of filing and record of the lien, which is omitted from the copy of the same as it appears in the present transcript.

6th. So much of the several certificates of incorporation (Exhibits 1 to 8, inclusive) as will show the respective dates of the several incorporations and consolidations made therein, and the names of the constituent companies as well as the name adopted after the consolidation.

7th. Tracings and map showing the line of railroad in the city of Toledo, with the location of the Hunter and Poe tracts and their relation to other property of the railroad company, being Exhibit No. 9.

JOHN H. DOYLE,
Solicitor for Thomas H. Hamilton.

The appellants will take notice that the appellee will file herein a motion, a copy of which is above given, and that said motion will be called up for hearing on Monday, December 9, 1889, at 12 o'clock m.

JOHN H. DOYLE,
Solicitor for Appellee.

SUPREME COURT OF THE UNITED STATES. OCTOBER TERM, 1889.

THE TOLEDO, DELPHOS AND BURLINGTON RAILROAD COMPANY *et al.*, *Appellants*,

vs.

THOMAS H. HAMILTON, *Appellee.*

Alexander W. Scott, being duly sworn, says he was solicitor for appellee in the circuit court in this case, and that he is familiar with the record in this case; that all of the testi-

mony, pleadings, and exhibits referred to in the above motion are a part of said record in the said circuit court and, as affiant believes are all relevant and material to the issue presented by the record herein and the rights of the parties and material to the decree appealed from herein, and that the rights of said parties cannot be justly determined without said testimony, pleadings, and exhibits being filed and printed herein; that all of said pleadings, exhibits, and testimony are on file and part of the record in said circuit court.

ALEXANDER W. SCOTT.

John H. Doyle, solicitor of record in this Court for the appellee, states that he has examined the record printed in this Court and the record of said cause in the circuit court, and that but a small part of the record has been certified to this Court, and the matters and things referred to in the motion hereto attached are, in his opinion, the same; are each and all of them material and necessary to a determination of the rights of the parties by this Court, and that each and all of said pleadings, exhibits, and testimony bear directly upon the issues presented between the parties to this appeal and the decree herein appealed from.

JOHN H. DOYLE.

THE UNITED STATES OF AMERICA, }
State of Ohio, Lucas County, } *ss*:

Personally appeared before me this 29th day of November, 1889, Alexander W. Scott, who, being duly sworn, says that the facts stated in the above affidavit are true, as he believes.

[Notarial Seal, Lucas County, Ohio.]

WM. A. MILLS,
Notary Public, Lucas County, Ohio.

TOLEDO, *November* 30, 1889.

A copy of the above motion, notice, affidavit, and statement received this day.

CLARENCE BROWN,
Of Counsel for Appellant.

Endorsed: Supreme Court U. S. 1889, October term. No. 184. The Toledo, Delphos and Burlington R. R. Co. *et al.*, app'ts, *v.* Thos. H. Hamilton. Motion to compel app'ts to complete transcript of record and affidavit of A. W. Scott in support thereof.

[Stamped:] Office Supreme Court U. S. Filed Dec. 2, 1889. James H. McKenney, clerk.

Office Supreme Court U. S.
FILED.
DEC 6 1889
JAMES H. MCKENNEY,
CLERK

SUPREME COURT

OF THE

UNITED STATES.

No. 184.

OCTOBER TERM, 1889.

THE TOLEDO, DELPHOS AND BURLINGTON RAILROAD COMPANY, THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD COMPANY, JAMES M. QUIGLEY, CHARLES T. HARBECK AND JOHN MCNAB, *Appellants.*

vs.

THOMAS H. HAMILTON.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

BRIEF IN BEHALF OF APPELLANTS.

BY JOHN M. BUTLER.

FRANK H. SMITH, INDIANAPOLIS.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1889.

THE TOLEDO, DELPHOS AND BURLINGTON RAILROAD COMPANY, THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD COMPANY, JAMES M. QUIGLEY, CHARLES T. HARBECK AND JOHN MCNAB, *Appellants.*

vs.

THOMAS H. HAMILTON.

No. 184.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

BRIEF IN BEHALF OF APPELLANTS.

STATEMENT.

This appeal presents for decision one of the multitude of suits growing out of the disastrous failure and hopeless bankruptcy of the Narrow Gauge Railroad System of Ohio, Indiana and Illinois.

On May 1, 1879, the Toledo and Maumee Narrow Gauge Railroad Company, the Toledo, Delphos and Indianapolis Railroad Company, the Delphos and Kokomo Railroad Company, corporations severally organized and existing under the laws of the State of Ohio, and the Delphos, Bluffton and Frankfort Railroad Com-

pany, a corporation organized and existing under the laws of the State of Indiana, by proper and lawful agreements of consolidation made and entered into under and pursuant to the laws of the States of Ohio and Indiana, created a single consolidated corporation under the name and style of the "Toledo, Delphos and Burlington Railroad Company." This consolidated company, by its charter, covered a continuous line of narrow gauge railroad from a point in the city of Toledo, Ohio, to the city of Kokomo, in the State of Indiana, that part of said line extending from the city of Toledo, Ohio, to the village of Warren, Indiana, then being so far constructed as to be in partial operation; that part of said line extending from Warren, Indiana, to the city of Kokomo, Indiana, then being in course of construction.

On January 17, 1880, the Toledo, Delphos and Burlington Railroad Company executed and delivered its First Mortgage to the Central Trust Company of New York, Trustee, to secure the payment of $1,250,000 six per cent. bonds. This First Mortgage conveyed by description the following described property:

"Unto the Central Trust Company of New York and to its successor or successors in trust, and for the uses and trusts hereby created, all and singular the line of railroad of the said party of the first part, as the same now is or hereafter may be constructed, between Toledo, Lucas county, Ohio, through the counties of Lucas, Wood, Henry, Putnam, Allen and Van Wert, in the State of Ohio; and the counties of Adams, Wells, Huntington, Wabash, Miami, Grant and Howard, in the State of Indiana, to the city of Kokomo, Indiana; being about one hundred and eighty miles in length:

Together with all and singular the right of way; roadbed, made and to be made; its track, laid or to be laid, between the terminal points aforesaid; together with all supplies, depot grounds, rails, fences, bridges, sidings, engine houses, machinery, shops, buildings, erections, in any way now, or hereafter, appurtenant unto said described line of railroad; together with all the engines, machinery, supplies, tools and fixtures, now, or at any time hereafter, owned or acquired by said party of the first part for use in connection with its line of railroad aforesaid; and all depot grounds, yards, sidings, turnouts, sheds, machine shops, leasehold rights, and other terminal facilities now, or hereafter, owned by the said party of the first part, together with all and singular the powers and franchises thereto belonging, and the tolls, and income, and revenue to be levied and derived therefrom."

This First Mortgage was duly recorded in the counties of Lucas and Henry, Ohio, on January 21, 1880; in the counties of Wood and Putnam, Ohio, on January 22, 1880; in the counties of Allen and Van Wert, Ohio, on January 23, 1880; in the counties of Adams and Wells, Indiana, on January 24, 1880; in the counties of Huntington and Wabash, Indiana, on January 26, 1880; in the counties of Grant and Howard, Indiana, on January 27, 1880; and in the county of Miami, Indiana, on January 28, 1880.

The Central Trust Company of New York accepted the trust conferred by said First Mortgage. The bonds secured thereby were issued by the company, certified by the Trustee and sold on the market, the proceeds of said bonds being applied upon the construction and completion of said line of railroad extending from Toledo, Ohio, to Kokomo, Indiana.

On the same day, January, 17, 1880, the Toledo, Delphos and Burlington Railroad Company executed and delivered to the Central Trust Company of New York, as Trustee, its Second Mortgage, to secure the payment of $1,250,000 of bonds, known and styled as Income Bonds, the said Second Mortgage executed to secure said Income Bonds being a second and junior lien upon all of the railroad, property, rights and franchises of the Toledo, Delphos and Burlington Railroad Company extending from the city of Toledo, Ohio, to the city of Kokomo, Indiana. The Central Trust Company of New York accepted the trust conferred by said Second Mortgage. The Income Bonds secured thereby were issued by the company, certified by the Trustee and sold on the market.

Afterwards, on June 21, 1880, the Toledo, Delphos and Burlington Railroad Company executed and delivered to the Central Trust Company of New York, as Trustee, its certain other mortgage known as the "Terminal Trust Mortgage," by which the railroad company attempted to secure the payment of $250,000 of bonds known as "Series A, Terminal Trust First Mortgage Bonds," by conveying and mortgaging all of its railroad, rights of way, property and terminal facilties at and within the corporate limits of the City of Toledo, Ohio, notwithstanding the fact that the First and Second Mortgages of said railroad company, executed and delivered January 17, 1880, each covered and conveyed, by proper and clear description, all of the railroad, rights of way, property and terminal facilities mentioned and described in the said Terminal Trust Mortgage of June 21, 1880. The Central Trust Company accepted the trust conferred by the said Terminal Trust Mortgage,

the company issued the bonds purporting to be secured by said Terminal Trust Mortgage, the Trustee certified said bonds and they were sold on the market.

Subsequent to January 17, 1880, and prior to February 25, 1882, the Toledo, Delphos and Burlington Railroad Company became, by various agreements of consolidation, and otherwise, the owner of several other lines of narrow gauge railroad in the State of Ohio, namely, a line from Delphos to Dayton; also a line from Dayton to Wellston, and thence to Gallipolis, with a branch to Ironton; also the narrow guage railroad formerly belonging to the Iron Railroad Company in Lawrence County, Ohio; and also a line from Shakertown to Lebanon, with a branch from Mercer to Shanesville.

On February 25, 1882, the narrow gauge railroad corporation known as the Toledo, Cincinnati and St. Louis Railroad Company, of Indiana and Illinois, formed by virture of certain consolidations of railroad corporations of the States of Indiana and Illinois, and a certain other narrow gauge railroad corporation known as the Frankfort, St. Louis and Toledo Railroad Company, a corporation of the State of Indiana, and the Toledo, Delphos and Burlington Railroad Company, entered into an agreement of consolidation under and pursuant to the laws of the States of Ohio, Indiana and Illinois, whereby the capital stock of said respective companies was consolidated, and all the lines of railroad of the said three corporations last named, constructed and projected, were vested in a single consolidated company under the name of the Toledo, Cincinnati and St. Louis Railroad Company.

This last consolidation vested in the Toledo, Cincinnati and St. Louis Railroad Company a continuous line

of railroad, either constructed or in process of construction, extending from Toledo, Ohio, to East St. Louis, Illinois, which line was thereafter known as the Main Line of the Toledo, Cincinnati and St. Louis Railroad Company.

Afterwards, in the early part of 1883, the Toledo, Cincinnati and St. Louis Railroad Company entered into a further agreement of consolidation with two narrow guage railroad corporations, known, respectively, as the "Cincinnati Northern Railway Company" and the "Spring Grove, Avondale and Cincinnati Railway Company," the first named company owning, and being then engaged in constructing, a line of railroad from Cincinnati, Ohio, to Waynesville, Warren County, Ohio, and the second named company being the owner of a line of railroad from a point in the City of Cincinnati to Spring Grove Cemetery, Hamilton County, Ohio, which line had theretofore been leased to the said Cincinnati Northern Railway Company. This last consolidation completed what was known thereafter as the Narrow Guage Railroad System of Ohio, Indiana and Illinois.

On and prior to March 20, 1883, the following named duly recorded mortgages were outstanding as first and prior liens upon the following named divisions of said Narrow Guage Railroad System then in possession of the Toledo, Cincinnati and St. Louis Railroad Company, namely:

1. First Mortgage, Toledo, Delphos and Burlington Railroad Company to Central Trust Company, Trustee, dated January 17, 1880, to secure $1,250,000 of bonds, and covering all the railroad, property, rights of

way, terminal facilities, real estate and superstructures then or at any time thereafter acquired in, and extending from, the City of Toledo, Ohio, to the City of Kokomo, Indiana.

2. Income Bond Mortgage, Toledo, Delphos and Burlington Railroad Company, to Central Trust Company, Trustee, dated January 17, 1880, to secure $1,250,000 of Income Bonds, and covering as a second and junior lien precisely the same property covered by the First Mortgage above described.

3. Terminal Trust Mortgage, Toledo, Delphos and Burlington Railroad Company to Central Trust Company, Trustee, dated June 21, 1880, to secure $250,000 of Series A, Terminal Trust First Mortgage bonds, and purporting to cover and convey all of the railroad, property, real estate and terminal facilities of the Toledo, Delphos and Burlington Railroad Company in the City of Toledo.

4. First Mortgage, Toledo, Delphos and Burlington Railroad Company to Central Trust Company, Trustee, dated July 1, 1880, to secure $1,000,000 of bonds, and covering the Dayton Division from Delphos to Dayton.

5. First Mortgage, Toledo, Delphos and Burlington Railroad Company to Central Trust Company, Trustee, dated May 16, 1881, to secure $250,000 of bonds, and covering the Cincinnati Division from Shakertown to Lebanon, Ohio.

6. First Mortgage, Toledo, Delphos and Burlington Railroad Company to Central Trust Company, Trustee, dated May 16, 1881, to secure $2,250,000 of bonds, and covering the Southeastern Division from Dayton to Ironton, Ohio.

June 21, 1880, in which conflict and antagonism of interest it became and was improper, and, in fact, impossible, for the Central Trust Company to fairly represent its *cestuis que trustent* under the two antagonistic mortgages.

The bondholders under the First Mortgage of January 17, 1880, united in the appointment of a Committee of Bondholders, consisting of James M. Quigley, Charles T. Harbeck and John McNab, to represent the interests of the bondholders in said litigation.

On December 5, 1884, this Bondholders Committee applied to the Circuit Court of the United States for the District of Indiana for an order making said Committee co-complainants with the Central Trust Company in the foreclosure proceedings, which order was immediately granted.

Afterwards, on December 10, 1884, this Bondholders Committee petitioned the Circuit Court of the United States for the Northern District of Ohio, Western Division, for a like order making said Bondholders Committee co-complainants with the Central Trust Company in the proceedings for the foreclosure of the First Mortgage of January 17, 1880, which order was immediately granted by the Court, and appears in the record on pages 30–31. Leave was also granted said Bondholders Committee to file an amendment to the original bill of the Central Trust Company, which amendment was filed by said Bondholders Committee on December 10, 1884, and appears in the record on pages 31 to 45.

On the same day—December 10, 1884—the Court entered an order appointing A. J. Ricks Special Master to inquire and state what specific property was embraced

and included within the general descriptive terms of the First Mortgage of the Toledo, Delphos and Burlington Railroad Company, dated January 17, 1880; and also to inquire and state what, if any, liens or claims there were upon the property in the pleadings described, and all questions of amounts and priority of said liens or claims, if any were found to exist. This order appears in the record on pages 45 and 46.

Under this order of reference a large amount of evidence was taken, and in August, 1885, the Master filed his report. Inasmuch as the Master's report, under this order of reference, covered questions that would of necessity come before the Courts of both the Sixth and Seventh Circuits,—the railroad and property being situated in both Circuits,—it was immediately arranged that there should be a joint sitting of the Circuit Judges of the Sixth and Seventh Circuits at Cincinnati, at which joint sitting counsel, representing the various interests covered by said Master's report, might present their objections and exceptions to said report for joint hearing and consideration by the said Circuit Judges of the Sixth and Seventh Circuits, to the end that there might be uniformity of decision in the two Circuits. November 2, 1885, was finally, after much correspondence, agreed upon as the time for the joint sitting at Cincinnati. Hon. W. Q. Gresham, Circuit Judge of the Seventh Circuit, went from Chicago to Cincinnati to attend that joint sitting. Counsel were there present from New York, Boston, Chicago, Cleveland, Toledo, Indianapolis, and other points, for the purpose of then and there presenting their objections and exceptions to the Master's report to the Circuit Judges of the two Circuits sitting together. Very shortly after the joint

sitting commenced, and before the opening statement of counsel stating the various points and questions that would be presented for consideration and decision was concluded, Hon. John Baxter, Circuit Judge of the Sixth Circuit, suddenly announced that he would set aside the order of reference of December 10, 1884, under which Special Master Ricks had made his report, and that as soon as he reached Toledo to hold Court he would enter the formal order setting aside the said order of reference, leaving each mortgagee, and each claimant of lien of any kind, to prosecute independent actions to enforce their several rights and equities. Upon this announcement, the joint sitting, which was expected to occupy several days, was summarily ended. Judge Gresham returned to Chicago, and the various counsel interested left Cincinnati, without presenting to the Circuit Judges of the Sixth and Seventh Circuits any of their objections and exceptions to the report of Special Master Ricks, relying upon the announcement of the Circuit Judge of the Sixth Circuit that he would enter a formal order at Toledo setting aside the order of reference of December 10, 1884, under which Special Master Ricks had made his report.

This statement is proper, and perhaps necessary, because it accounts for the fact that no formal exceptions in behalf of the Bondholders Committee to the Master's report touching the claim of appellee Hamilton appear in this record.

Afterwards, in December, 1885, Hon. John Baxter, Circuit Judge of the Sixth Circuit, did enter at Toledo an order *partially* setting aside the order of reference of December 10, 1884, but without the knowledge, or presence, of counsel for the Bondholders Committee, re-

tained parts of the report of Special Master Ricks made under said order of reference of December 10, 1884, including that part of said report pertaining to the claim of appellee Hamilton and rendered and entered the findings and decree in favor of Hamilton involved in this appeal. (Record, pp. 73–75.)

Upon the attention of the Court,—Circuit Judge Baxter presiding,—being called to the fact that counsel for the Bondholders Committee had not filed formal exceptions to any part of the Master's report, because they relied upon the announcement made at Cincinnati that an order would be made setting aside the order of reference of December 10, 1884, the Court immediately entered, as a part of the decree in favor of appellee Hamilton, the exception of James M. Quigley, Charles T. Harbeck and John McNab, Bondholders Committee, the Toledo, Delphos and Burlington Railroad Company, and the Toledo, Cincinnati and St. Louis Railroad Company, directly to the order, findings and decree of the Court in appellee Hamilton's behalf, and granted this appeal from said order, findings and decree.

(Record, pp. 74, 75.)

It is further worthy of consideration, in this connection, that exceptions filed to the report of Special Master Ricks could not, by any possibility, have raised, or presented for decision, the questions presented by this appeal. The findings and decree of the Circuit Court are not based upon the Master's report; in fact, they are in direct antagonism to the Master's report. The Master does not base his finding and report in favor of Hamilton upon his alleged *statutory mechanic's lien*, but, instead, bases the finding and report upon a supposed "equitable lien" growing out of the assumption that Hamilton's materials and

labor had conserved and added value to the mortgaged estate. While it is true that the Master finds that "Hamilton took the necessary proceedings under the statutes of Ohio, to perfect and assert his lien for the labor performed and materials furnished under said contract as against the Toledo, Cincinnati and St. Louis Railroad Company," it is very evident from the report that the Master did not base his finding upon that fact, or consider it of any weight in the direction of giving Hamilton priority and preference in payment over the bonds secured by the First Mortgage of January 17, 1880. The Master does not find that a statutory mechanic's lien can, under the laws of Ohio, be taken against, or upon, a *railroad;* neither does he find that a mechanic's lien is, under the laws of Ohio, prior and paramount to the lien of pre-existing, duly recorded mortgages. On the contrary, the Master, very evidently, wholly failed to consider and recognize the wide distinction between claims for the *original construction* of a railroad, and claims for *operating and maintaining* a railroad already open to the public for transportation of persons and property. No one can read the Master's report without being perfectly satisfied that he based his finding and report in favor of Hamilton wholly upon the principle announced in the decisions of this Court in *Fosdick* v. *Schall*, 99 U. S. 235, and other cases following and reaffirming that case. The following quotation from the Master's report proves the correctness of my statement:

"The work performed and materials furnished under this contract were essential to the completion of the railroad and to enable it to secure the grain freights of the West, for which it was largely constructed. Without such dock facilities it was believed by the officers of

the company that it would not be able to do the business for which it was chiefly constructed. The property of the mortgagor has been appreciated in value by the amount of labor and supplies furnished by Hamilton. The labor and supplies for which this lien is claimed were therefore of such a character, as in my judgment, bring it within the class of claims which have been frequently recognized by the courts of federal jurisdiction. As counsel for all parties in argument conceded the strong equities of this claimant and rather urged its recognition, if it could be protected by law, I report that said Hamilton has an equitable lien upon said roadbed of the Toledo, Cincinnati and St. Louis Railroad, as the successor of the Toledo, Delphos and Burlington Railroad Company, which should be paid prior to the bonds secured by the mortgage of January 17, 1880."

(Record, p. 73.)

It is to be observed that the Master here finds that Hamilton's work was *original construction*. He says, "The work performed and materials furnished under this contract *were essential to the completion of the railroad*." This statement of the Master makes the decisions of this Court, upon which he evidently bases his report "that said Hamilton has an equitable lien," wholly inapplicable, as will be shown in another connection in this brief.

But the findings and decree of the Circuit Court here appealed from are not based upon this Master's report at all. They are entirely independent of it, and are directly antagonistic to it. The decree shows that "the intervening petition * * * and the evidence was submitted to the Court." The Court finds and decrees,

First. That Hamilton acquired a statutory mechanic's lien.

Second. That Hamilton's mechanic's lien "is a lien, prior to all other liens."

Third. That Hamilton's mechanic's lien extends to the entire railroad and must be paid out of proceeds of foreclosure sale in preference to any payment upon bonds secured by the First Mortgage of January 17, 1880.

(Record pp. 73, 74.)

It is perfectly evident that the findings and decree of the Circuit Court are based wholly and solely upon the alleged mechanic's lien, and not at all upon the principle of equitable jurisprudence, which the Master assumed to be applicable to Hamilton's claim, and upon which he based his report.

It is plain that exceptions to the Master's report could not have raised the questions presented by the decree appealed from. The absence of formal exceptions would, therefore, be immaterial, even if such absence had not been accounted for by the public announcement made by the Circuit Judge of the Sixth Circuit at Cincinnati, at the joint sitting of the Circuit Judges of the Sixth and Seventh Circuits.

The pleadings and testimony upon which the Court based the order, findings and decree appealed from are set forth in the record. (Record, pp. 18-30 and 46-72.)

THE CONTROVERSY.

The exact controversy presented by this appeal is between the bondholders secured by the First Mortgage of the Toledo, Delphos and Burlington Railroad Company, dated January 17, 1880, and Thomas H. Hamilton, whose claim of priority of lien is based upon the asser-

tion by him of an alleged mechanic's lien which he filed in the office of the Recorder of Lucas County, in the City of Toledo, Ohio, on August 30, 1883. The only part of the Narrow Guage Railroad System involved in this appeal is the railroad and property covered and conveyed by the First Mortgage of the Toledo, Delphos and Burlington Railroad Company to the Central Trust Company, Trustee, dated January 17, 1880, being the railroad and property extending from Toledo, Ohio, to Kokomo, Indiana.

On March 20th, May 9th and June 2d, 1883, respectively, appellee Hamilton entered into three several contracts with the Toledo, Cincinnati and St. Louis Railroad Company,—by consolidation, successor to the Toledo, Delphos and Burlington Railroad Company,—for the erection of a certain dock on the Maumee River, in the City of Toledo, Lucas County, Ohio.

(Record, pp. 22–29.)

It should, in this connection, be definitely remembered that the First Mortgage of the Toledo, Delphos and Burlington Railroad Company was executed and delivered *January 17, 1880*, and was duly recorded in the office of the Recorder of Lucas County, Ohio,—the County in which appellee Hamilton furnished the material and performed the work for which he claims a lien prior and superior to the lien of the First Mortgage Bonds,—on *January 21, 1880*, more than three years before Hamilton made the contract for the erection of the dock.

It should further be remembered that at the time Hamilton entered into the three contracts with the Toledo, Cincinnati and St. Louis Railroad Company for

the erection of the dock, the Toledo, Cincinnati and St. Louis Railroad Company,—as successor of the Toledo, Delphos and Burlington Railroad Company,—had made default in the payment of interest on the bonds secured by the First Mortgage of January 17, 1880, and remained in default. The first default occurred January 1, 1883, and the second default July 1, 1883, which installments of interest are still due and will forever remain in default.

It is scarcely possible that Hamilton was ignorant of these defaults.

About the time Hamilton completed the work called for by his contracts, in fact, before the completion of his work, to-wit: on August 1, 1883, one Dwight was appointed Receiver by the Court, and took possession of the entire railroad and property then in possession of the Toledo, Cincinnati and St. Louis Railroad Company. (Record pp. 48–50.)

On August 30, 1883, Hamilton filed in the office of the Recorder of Lucas County his affidavit and statement of account, wherein and whereby he undertook to claim, assert and secure a mechanic's lien upon two certain lots or parcels of land definitely described in said affidavit and claim of mechanic's lien. This affidavit and claim of lien is set out in the record.

(Record, pp. 62, 63.)

The date of record of this instrument is also given in the record. (Record, pp. 46, 47.)

On April 25, 1884, Hamilton filed his intervening petition in the foreclosure proceedings in which Quigley, Harbeck and McNab, as Bondholders Committee, were made co-complainants with the Central Trust Company,

Trustee, by the order of Court of December 10, 1884, hereinabove mentioned and cited.

In the first paragraph of his petition, appellee Hamilton clearly admits his knowledge of the fact that mortgages and mortgage bonds were outstanding on the railroad and property when he made his contracts with the Toledo, Cincinnati and St. Louis Railroad Company for the erection of the dock. His petition contains this statement:

"Your petitioner further says that the labor performed and materials furnished by him, as set forth in said Exhibit A, thereto attached, was performed and used in permanently improving and rendering more valuable the property of the defendant, the Toledo, Cincinnati and St. Louis Railroad Company, mortgaged to secure the several series of bonds issued by said last-named company and the several companies embodied in said last-named company by the consolidation fully set out in the several pleadings in this cause hereinbefore made." (Record, p. 19.)

The second paragraph of the petition,—and, in fact, the whole petition, and prayer for relief,—is based solely upon the alleged mechanic's lien upon two certain lots or parcels of land definitely described in the intervening petition. (Record, pp. 19, 20.)

No lien is claimed on any of the railroad or property covered by the First Mortgage of January 17, 1880, excepting only the two parcels of land described in the petition and in the affidavit and claim of lien filed in the Recorder's Office, and that alleged lien is based wholly upon the theory that a contractor for the construction of a railroad, or some part thereof, can, under the laws

of Ohio, secure a mechanic's lien on the part of the railroad constructed by him, which lien will be prior and superior to the lien of First Mortgage Bonds issued several years before the contractor performed any construction work for the Mortgagor Company.

In the decree the Court finds that the balance found due to Hamilton "is a lien, prior to all other liens, upon the premises described in the petition, by reason of the mechanic's lien in said intervening petition described, and that said Thomas H. Hamilton is entitled to have said lien enforced." The decree then sets out the exact description of the two lots or parcels of land just as the same are described in the intervening petition of Hamilton and in his affidavit and statement filed in the Recorder's Office of Lucas county, Ohio.

The Court further finds that the two lots or parcels of land upon which the mechanic's lien is found and decreed to exist as a first and superior lien, "are part of the property of the said Toledo, Cincinnati and St. Louis Railroad Company, covered by the first mortgage of the Toledo, Delphos and Burlington Railroad Company, in this suit sought to be foreclosed, and as said property so covered by said mortgage, including the property upon which the lien aforesaid is found, will be sold as an entirety."

The Court then decrees that the balance of $27,-861.80 found and decreed due to Hamilton, together with interest thereon and costs, shall be paid in full out of the proceeds of sale of the mortgaged property, in preference to any payment upon the bonds secured by the First Mortgage of January 17, 1880.

The words of the decree are as follows: "That

upon the sale of said property under said foreclosure proceedings, including the property upon which the lien aforesaid is found, so much of the proceeds thereof as may be necessary to satisfy the judgment and lien in favor of said Hamilton herein be applied thereto, and that such provision shall be included in any order of this Court making distribution of the said fund arising from the sale of the premises under the said foreclosure proceedings." (Record p. 74.)

ASSIGNMENT OF ERRORS.

1. The Court erred in finding and decreeing that appellee Hamilton acquired any mechanic's lien whatsoever upon the railroad, property, lands, structures and terminal facilities of the Toledo, Cincinnati and St. Louis Railroad Company,—by consolidation, successor to the Toledo, Delphos and Burlington Railroad Company,—or any portion thereof.

2. The Court erred in finding and decreeing the alleged mechanic's lien of appellee Hamilton to be "prior to all other liens, upon the premises described in the petition, by reason of the mechanic's lien in said intervening petition described, and that said Thomas H. Hamilton is entitled to have said lien enforced:" The Court also erred in finding and decreeing the alleged mechanic's lien of appellee Hamilton to be, in effect, a first, prior, and paramount lien upon the entire railroad and property covered and conveyed by the First Mortgage of the Toledo, Delphos and Burlington Railroad Company, dated January 17, 1880, extending from Toledo, Ohio, to Kokomo, Indiana.

3. The Court erred in finding and decreeing that the balance due appellee Hamilton under construction contracts made with the Toledo, Cincinnati and St. Louis Railroad Company,—by consolidation, successor to the Toledo, Delphos

and Burlington Railroad Company,—for the construction of part of its railroad and terminal facilities in the city of Toledo shall be paid in full out of proceeds arising from foreclosure sale of the railroad and property, in preference to any payment upon bonds secured by the First Mortgage of the Toledo, Delphos and Burlington Railroad Company, dated January 17, 1880.

ARGUMENT.

I.

NO MECHANIC'S LIEN EXISTS IN FAVOR OF APPELLEE, HAMILTON. THE STATUTES OF OHIO DID NOT GIVE TO HAMILTON, AS A CONTRACTOR FOR THE CONSTRUCTION OF A PORTION OF THE RAILROAD, ANY MECHANIC'S LIEN UPON THE RAILROAD, OR UPON THE PORTION THEREOF CONSTRUCTED BY HIM.

THE MECHANIC'S LIEN LAW OF OHIO DOES NOT APPLY TO RAILROADS AND THEIR CONSTRUCTION.

The true rule of interpretation of State Statutes known as Mechanic's Lien Laws, is stated with clearness and terseness in the decision of this Court in the case of *Buncombe County Commissioners, and others*, v. *Tommey, and others*, 115 U. S. 122. In the opinion, at pages 127 to 129 Mr. Justice Harlan says:

"We rest our interpretation of the statute upon the ground that it has no reference to work done or materials furnished in the construction of railroads. The words of the act are scarcely adequate to express a purpose to give a lien upon a public improvement of that character. The words 'building,' 'lot,' 'farm' and 'any kind of property not herein enumerated' are too limited in their scope to justify the conclusion that the legislature had any intention, by that act, to give a lien

upon railroad property. This view is strengthened by the circumstance that, by the subsequent act providing for the organization of railroad companies and regulating their affairs, no saving is made of liens in behalf of mechanics and laborers, and express power is given to such corporations to borrow, from time to time, any sums necessary for completing and furnishing or operating their railraods upon bonds secured by mortgage upon their corporate property and franchises. Indeed, the idea of a lien in favor of laborers actually performing work in the construction of a railroad seems to have been intentionally excluded; for, when the railroad contractor fails to pay such laborers, the company, upon notice, may become bound to do so; but no lien is given therefor upon the property of the corporation.

"Apart, however, from these considerations, we are of opinion that a law, giving to mechanics and laborers a lien on buildings, including the lot or ground upon which they stand, or a lien upon a lot or farm or other property, for work done thereon, or for materials furnished in the construction or repair of buildings, should not be interpreted as giving a lien upon the roadway, bridges, or other property of a railroad company, that may be essential in the operation and maintenance of its road. In North Carolina, as in most, if not in all the States, railroads, although constructed for the private emolument of those engaged in such enterprises, are highways which have been established, under the authority of law, primarily for the convenience and benefit of the public. The general statute of February 8, 1872, authorized the formation of corporations to construct, maintain, and operate railroads 'for public use in the conveyance of persons and property, or for

the pnrpose of maintaining and operating any unincorporated railroad already constructed for the like public use.' Battle's Revisal, ch. 99, Sec. 1. The pecuniary profit derived by those who project and operate them is the reward which they receive for maintaining a public highway. Municipal taxation to aid in their construction has been maintained only upon the ground that they are, in a large sense, instrumentalities or agencies for the purpose of accomplishing public ends. Upon that ground rests the authority of the State to invest them with the right of eminent domain in the condemnation of private property, and to prescribe from time to time, in the interest of the public, reasonable regulations for their control and management. *Taylor* v. *Ypsilanti* 105 U. S. 60, 68–9. Such being the relations existing in North Carolina between these corporations and the public, it should not be presumed that the legislature intended to subject them to the operation of ordinary lien laws, enacted for the benefit of those performing labor and furnishing materials in the construction, repair or improvement of what the statute of 1870 designates as buildings, or who perform labor upon lots, farms, and other property, belonging to private persons, and having no connection with public objects. A different construction of the statute would enable parties having liens for amounts, within the jurisdiction of Justices of the Peace to destroy a public highway, and defeat the important objects which the State intended to subserve by its construction. No such intention should be imputed to the Legislature unless the words of the statute clearly require it to be done."

An examination of the Mechanic's Lien Law of Ohio will prove that this authority is precisely in point and peculiarly applicable to the case at bar.

The alleged mechanic's lien of appellee Hamilton is based upon Sections 3184 and 3185, Revised Statutes of Ohio, 1880. These two sections are as follows:

"Sec. 3184. A person who performs labor or furnishes machinery or material for constructing, altering or repairing a boat, vessel, or other water craft, or for erecting, altering, repairing, or removing a house, mill, manufactory, or other building, appurtenance, fixture, bridge, or other structure, by virtue of a contract with the owner or his authorized agent, shall have a lien, to secure the payment of the same, upon such boat, vessel, or other water craft, or upon such house, mill, manufactory, or other building, or appurtenance, fixture, bridge or other structure, *and the interest of the owner in the lot of land on which the same may stand or to which it may be removed.* (74 v. 168, Sec. 1).

"Sec. 3185. Such person, in order to obtain such lien, shall, within four months from the time of performing such labor or furnishing such machinery or material, file with the recorder of the county where the labor was performed, or the machinery or material furnished, an affidavit containing an itemized account of the amount and value of such labor, machinery, or material, with all credits and offsets thereon, a copy of the contract, if it is in writing, and if it is not in writing, a statement of the amounts and times of payment to be made thereunder, and a description of the land on which the house, mill, manufactory, or other building, or appurtenance, fixture, bridge, or other structure may stand, or to which it may be removed; and the same shall be recorded in a separate book to be kept therefor, and shall operate as a lien from the date of the first item of the labor performed, or the machinery or material furnished upon or

toward the property designated in the proceeding section, *and the interest of the owner in the lot or land on which the same may stand, or to which it may be removed*, for two years from and after the date of the filing of such attested account; if an action is brought to enforce such lien within that time, the same shall continue in force until the final adjudication thereof; and there shall be no homestead or other exemption as against any mechanics' lien under the provisions of this chapter. (75 v. 48, Sec. 2)."

It is very evident from the language of these two sections that the Legislature did not intend that they should apply to the construction of railroads or railroad buildings and superstructures. This is made more apparent by an examination of other portions of this same lien law of Ohio. This law embraces Sections 3184 to 3231 inclusive, Revised Statutes of Ohio, 1880.

Sections 3184 to 3206 evidently apply solely to what may be called *private* buildings, fixtures, structures and erections, with a fixed and definite locality, as contra-distinguished from a building or superstructure that forms part of a railroad extending into and through several States. Section 3186 well illustrates this evident intention. It provides as follows:

"Sec. 3186. A person who performs labor or furnishes material for constructing, altering, or repairing any street, turn-pike, road, sidewalk, way, drain, ditch, or sewer, by virtue of a private contract between him and the owner of *lands abutting thereon*, or his authorized agent, shall have a lien for the payment of the same against the lands of such owner. (74 v. 168, Sec. 3.)"

Sections 3193 to 3206 provide security for sub-con-

tractors, material men, laborers and mechanics, as against chief or head contractors. Thus the Ohio lien law, as found in Sections 3184 to 3206 inclusive, makes provision for the protection of persons in any capacity engaged in the erection, construction or repair of private buildings, fixtures, erections, structures and appurtenances with fixed and definite localities. Railroads and railroad construction are not mentioned or included in any of these sections. That it was not intended by the Legislature that any of these sections should apply to railroads, and the construction of railroad buildings, erections and superstructures, is made absolutely certain, from the fact that the law proceeds to treat of railroad construction in subsequent sections under the head of "Railroad Sub-Contractors."

Sections 3207 to 3211 inclusive,—Revised Statutes of Ohio, 1880,—provide ways and means by which subcontractors engaged in furnishing materials for, or in performing labor in, the construction of a railroad, or any structure, erection or building appurtenant thereto, may acquire a lien,—*not upon the railroad, building or structure*,—but upon the money due, or to become due, to the chief or head contractor under his construction contract with the railroad company. No lien whatever is given to the chief or head contractor for materials furnished, or for labor performed by him for the railroad company under his construction contract. These five sections of the lien law relating to construction of railroads and railroad buildings, erections and superstructures would be meaningless, and wholly unnecessary, if Sections 3184 to 3206, inclusive, are applicable to persons engaged in the construction of railroads or railroad buildings, erections and superstructures.

The foregoing statement exhibits the mechanic's lien law of Ohio as it existed in the year 1880, when the First Mortgage of the Toledo, Delphos and Burlington Railroad Company was executed and delivered, and when the First Mortgage Bonds secured by that mortgage were issued by the railroad company, certified by the Central Trust Company, as Trustee, and sold on the market.

The mechanic's lien law of Ohio, as it existed at that time,—as above cited,—is the statute governing this case, and measuring the rights of appellee Hamilton touching his alleged mechanic's lien, because the Legislature of Ohio would be powerless, by any act passed *after* these First Mortgage Bonds were issued and sold for value, to impair, abridge or modify the obligations of the lawfully made contract contained in the First Mortgage.

The statutes of Ohio fully authorized railroad corporations of that State to mortgage their projected railroads and sell their mortgage bonds to raise money *for the construction of their railroads*, and provided that such mortgages, duly recorded, "shall be held to be a good and substantial lien from the date of the record of the same in each county where it is recorded, as well upon the personal as the real property of the company."

Revised Statutes of Ohio, 1880, Sections 3274 and 3286 to 3290 inclusive.

In the entire railroad law of Ohio no provision whatever can be found authorizing a mechanic's lien in any form, or authorizing any such lien to take priority over a duly executed and recorded mortgage.

On April 6, 1883, the Legislature of Ohio passed an act amending sections 3207-3211 above cited, by which

amendatory act the Legislature made more stringent provisions for the protection of sub-contractors and laborers, material men and boarding-house keepers, employed by contractors or sub-contractors, engaged in constructing railroads. This amendatory act gives these classes of laborers and furnishers a lien upon the railroad up to the full amount called for by the contract between the railroad company and the chief or head contractor.

Laws of Ohio, Vol. 80, p. 99.

If counsel for appellee Hamilton should attempt to build any argument in support of the decree appealed from upon this act of April 6, 1883, several sufficient and complete answers may be made to any such argument.

First: This amendatory act applies to *sub-contractors* and laborers and furnishers under sub-contractors, while Hamilton is a chief contractor, and neither a sub-contractor, nor a laborer or furnisher under a head contractor or sub-contractor.

That this statement is correct, plainly appears from the following portion of the second section of the act of April 6, 1883:

"In order to perfect such lien, a person performing labor, or furnishing materials, or boarding, as herein specified, shall, within forty days from the date that such person ceased performing labor, or furnishing materials, or boarding, on or for the railroad, file with the recorder of the county where the labor was performed, or materials, or boarding furnished, an affidavit containing an itemized statement of the kind and amount of materials furnished, or labor performed, the time when, the contractor or sub-contractor for whom, and the section and place where, on the line of the road the labor was per-

formed, or materials furnished, and the amount due therefor, after crediting all payments and set-offs; and, in case of boarding furnished, such affidavit shall have attached thereto an itemized account of such board, showing the name of the contractor or sub-contractor on whose order it was furnished, the several persons to whom the same was furnished, the weekly rate of boarding, and the several accounts unpaid by each respectively. On filling the affidavit here provided for, it shall be recorded in a separate book to be provided therefor, and shall then operate as a lien on said railroad, in the manner and subject only to the limitations here provided. The claimant shall, within ten days after filing his affidavit with the recorder, serve a notice in writing upon the secretary, or other officer or authorized representative of the railroad company, by delivering or leaving a copy thereof at his usual place of residence, or place of doing business, which notice shall contain a statement of the facts of his filing such affidavit, the county wherein filed, the amount of his claim, and whether for labor, materials or boarding furnished, and the contractor or sub-contractor for whom rendered. Provided, that when the notice in writing required to be served upon the secretary, or other officer or authorized representative of the railroad company, can not be served in the county where said affidavit is filed, such notice shall be served by the recorder upon the representative of the railroad aforesaid by depositing in the postoffice a letter containing such notice directed to his place of residence, or place of doing business, if known to such recorder. Any person failing to file his affidavit aforesaid, and serving the notice aforesaid within the time herein prescribed, shall be deemed

and held to have waived all claim under this section against the railroad company."

Second. Even if this amendatory act should be held to apply in favor of chief or head contractors, still it could not by any possibility furnish any aid or support to Hamilton, *because he never complied with its requirements.*

Under this act, as quoted, *supra*, in order to perfect a lien, the claimant "shall, *within forty days* from the date that such person ceased performing labor, or furnishing materials, or boarding, on or for the railroad, file with the recorder of the county where the labor was performed, or materials or boarding furnished, an affidavit containing an itemized statement" of his claim.

Again,

"The claimant shall, *within ten days* after filing his affidavit with the recorder, *serve a notice in writing upon the secretary, or other officer or authorized representative of the railroad company*, by delivering or leaving a copy thereof at his usual place of residence, or place of doing business, which notice shall contain a statement of the facts of his filing such affidavit, the county wherein filed, the amount of his claim, and whether for labor, materials or boarding furnished, and the contractor or sub-contractor for whom rendered. Provided, that when the notice in writing required to be served upon the secretary, or other officer or authorized representative of the railroad company, can not be served in the county where said affidavit is filed, such notice shall be served by the recorder upon the representative of the railroad aforesaid by depositing in the postoffice a letter containing such notice directed to his place of residence, or place of doing buisness, if known to such recorder."

Appellee Hamilton never complied with either of these requirements. His alleged instrument of lien proves conclusively that it is based wholly and solely upon Sections 3184 and 3185, Rev. Stats. of Ohio, 1880, first above quoted. His affidavit filled with the recorder makes no mention of the date at which he ceased work on the dock, nor does it state that the affidavit is filed "within forty days" from the date he ceased work. On the contrary, his alleged instrument of lien follows the requirement of Section 3185, *supra*, as is proved by the following quotation from his affidavit filled in the office of the recorder of Lucas county, Ohio:

"This affidavit is made to secure a building lien on said premises for the use and benefit of the said Thomas H. Hamilton, by whom said work was done and materials were furnished within four months last part."

(Rec. p. 63.)

There is no pretense that Hamilton served upon the railroad company, or its officers or representatives, the notice of lien required by the act of April 6, 1883, "*within ten days*" after filing his affidavit with the recorder, or at any time whatever. The record contains no proof, or intimation, that any such notice was ever served.

The act of April 6, 1883, expressly provides that no lien can be acquired without due service of this notice. The words of the act are as follows:

"*Any person failing to file his affidavit aforesaid, and serving the notice aforesaid, within the time herein prescribed, shall be deemed and held to have waived all claim under this section, against the railroad company.*"

It therefore seems utterly impossible for Hamilton to claim any support from the act of April 6, 1883.

Third. But there are other reasons why this new law cannot aid Hamilton.

It was not passed until *after* Hamilton had entered into his principal contract for the construction of the dock. His chief contract, covering a very large proportion of all of his work, was executed in writing on March 20. 1883 (Record pp. 22-24), while the new law was passed April 6, 1883.

Fourth. Again, this act of April 6, 1883, was passed more than three years after the First Mortgage of the Toledo, Delphos and Burlington Railroad Company had been executed, delivered and duly recorded; and after the bonds had been issued under it, and sold for value, upon the faith of the statutes of Ohio *as they then existed.*

The laws of Ohio, then in force, entered into, and formed part of, this mortgage and these bonds, and the contracts therein contained.

The Legislature of Ohio could pass new statutes, to govern, and apply to, railroad mortgages executed after their passage; but the Legislature is powerless to pass any statute that would impair, abridge or modify the obligations of pre-existing contracts lawfully made.

Coe v. *New Jersey Midland Railway Co.*, 31 N. J. Eq. Reps., p. 130.
Wood's Railway Law, Vol. 2, Section 292.
Jones on Railroad Securities, Section 557.

Appellee Hamilton must, therefore, rely solely upon the lien law of Ohio as it existed from 1877 up to April 6, 1883, as found in Revised Statutes of Ohio, 1880, Sections 3184 to 3211, inclusive. That he does rely wholly, and only, upon this statute, is conclusively shown by his

intervening petition, and by his alleged instrument of lien filed in the recorder's office.

(Record pp. 18, 19, 20 and 62, 63.)

Consideration of the mechanics' lien law, as found in Revised Statutes of Ohio, 1880, Sections 3184 to 3211, inclusive, will now be resumed.

The proposition now under discussion is that Hamilton acquired no mechanic's lien upon the railroad: That the statutes of Ohio did not give him, as a construction contractor, any lien upon the railroad, or upon the portion thereof constructed by him: And that the mechanic's lien law of Ohio does not apply to railroads and their construction. The two principal sections of the statute are quoted in full, *supra*, pp. 25, 26.

The reason for not permitting mechanics' liens, providing for the protection of persons engaged in constructing, or furnishing materials for, private buildings, fixtures, erections and structures, to apply to railroads and railroad buildings, erections, structures and appurtenances, seems very plain. Railroad corporations are *quasi* public corporations. They are endowed with extraordinary powers and priviliges, including the right to exercise the right of eminent domain, and are charged with corresponding public functions and duties.

It would be a strange system of law that would permit a railroad corporation to condemn the land of A for the purpose of erecting thereon a station house, water tank, dock, or other necessary terminal facility, and would then permit B, who erected the building or structure on the condemned land, to become the owner of the condemned land or the owner of all the rights the company possessed in said condemned land and the

structure erected thereon, through foreclosure of a mechanic's lien, and thereby prevent the railroad company from performing the duties to the public, for the proper performance of which it was empowered to condemn, and did condemn, the land.

The Supreme Court of Ohio has very definitely settled this question, in construing this identical mechanics' lien law.

In *Rutherfoord & Co.* v. *Railroad Co.* 35 Ohio State, 559, the Court held:

"Section 1 of the act of 1877 (74 Ohio L. 168), which authorizes a mechanic's lien on 'any house, mill, manufactory, or other building, appurtenance, fixture, bridge, *or other structure,*' and on the interest of the owner of the same, 'in the lot of land on which the same shall stand or be removed to,' for labor performed or machinery or materials furnished by the contractor, 'for erecting, altering, repairing, or removing' the same, does not authorize such a lien upon a *railroad.*"

After discussing the various sections of this lien law, and former lien laws of Ohio, the opinion, as found on page 566, is as follows:

"This omission is significant, and to our minds, conclusive, that the words, 'other structure,' which then first appears, in favor of head contractors, does not include a railroad.

"The practical difficulty, and I might say the impossibility, of enforcing such liens on a line of railroad extending for long distances, constructed in sections as is the usual mode, by different contractors, each of whom might assert, as in this case, a lien on the whole line, or, at least, on the part he constructed, is apparent.

"Again, the law authorizes a mortgage on the line of road to be constructed and the francises, as well as the road when completed, to aid in its construction.

"It is a part of the history of railroad building in this State, that this mode of raising capital is generally resorted to. Such works require a large amount of capital, which could not be raised except on bond and mortgage. This can not be done if this lien existed, unless the mortgage was recorded before work was commenced, or after it was fully paid for.

"It has always been the policy of our Legislature to encourage the construction of railroads as aids to the development of the resources of the State. Hence the legislation which permits such mortgages to aid in their construction.

"The security which capital requires, and which was intended to be given by making such mortgages for completing the line of road as well as other purposes, not only on the property and franchises of the corporation then existing, but also on all after-acquired property and income (70 Ohio L. 291), a first lien on such property, forbids the idea of a mechanic's lien. It would defeat all efforts to negotiate bonds, for no one would purchase them if the entire cost of construction could thus be made a prior lien."

This decision has never been questioned, qualified or overruled, as to the points decided, so far as I have been able to ascertain.

Decisions in other States, on like mechanics' lien laws, seem to be in line with this decision.

Graham v. *Mt. Sterling Coal Road Co.*, 14 Bush (Ky.) 425.

Dunn v. *North Missouri R. R. Co.*, 24 Mo. 493.

Abercrombie, et al. v. *Ely, et al.*, 60 Mo. 23.
Leonard v. *City of Brooklyn*, 71 N. Y. 428.
La Crosse & Milwaukee R. R. Co. v. *Vanderpool*, 11 Wis. 124.
Truesdell v. *Gay*, 13 Gray (Mass.) 311.

I am aware that the Supreme Court Commission, of Ohio, in *Smith Bridge Co.* v. *Bowman*, 41 Ohio State, 37, did hold that a mechanic's lien can be taken, under Section 3184, Revised Statutes of Ohio, 1880, on a railroad bridge, because the words "any bridge" are used in that section of the lien law, but in this decision the decision in *Rutherfoord & Co.* v. *Railroad Co.*, *supra*, is expressly affirmed.

As is well known and recognized in Ohio, the Supreme Court Commission was only a temporary expedient, for the relief of the docket of the Court. Its decisions have never been regarded in Ohio, or elsewhere, as authority as high as the decisions of the regular Supreme Court.

The dissenting opinion of Chief Justice Granger, in *Smith Bridge Co.* v. *Bowman*, 41 Ohio State, pages 55 to 61, is peculiarly strong and clear, and seems based upon far sounder reason than the majority opinion.

But this case is not at all in point here, because it cannot be contended that the dock constructed by Hamilton is a "bridge." Under the explicit decision of the Supreme Court of Ohio, in *Rutherfoord & Co.* v. *Railroad Co.*, *supra*, construing and interpreting the mechanics' lien law of Ohio, appellee Hamilton could not, and did not, acquire any mechanic's lien whatever. The Court, therefore erred in finding and decreeing that Hamilton acquired and held a mechanic's lien.

chanic's lien acquired under that law, and provides that the mechanic's lien shall be subject to such prior liens.

The First Mortgage of the Toledo, Delphos and Burlington Railroad Company is such prior lien. It is prior, superior and paramount in lien to the lien of Hamilton's mechanic's lien—if Hamilton acquired any lien at all.

The Supreme Court of Ohio, in *Choteau, et al.* v. *Thompson*, 2 Ohio State, 114, in a very elaborate and exhaustive examination of the Ohio lien law of 1843,—which in this regard is substantially the same as the lien law of 1877,—held expressly that mechanic's liens are subject to prior mortgages.

In the opinion, at pages 126 and 127, we find the following statements:

"The lien does not override, or interfere with, prior *bona fide* liens. The idea that the builder, or material man, may have a lien upon the house to the exclusion of a mortgagee, or judgment creditor, whose lien attached before the house was erected, altered or repaired, is inadmissable, and could not, in practice, be carried out.

* * *

"We do not suppose that the law relating to mortgages, or to judgments and executions, was in any way affected by the enactment of the lien law. And we are of opinion, as before stated, that liens under this law do not, in any case or in any manner, interfere with prior *bona fide* liens."

In *Rutherfoord & Co.* v. *Railroad Co.*, *supra*, the Supreme Court of Ohio said:

"Again, the law authorizes a mortgage on the line of road to be constructed and the franchises, as well as the road when completed, to aid in its construction.

"It is a part of the history of railroad building in this State, that this mode of raising capital is generally resorted to. Such works require a large amount of capital, which could not be raised except on bond and mortgage. This can not be done if this lien existed, *unless the mortgage was recorded before work was commenced*, or after it was fully paid for."

The decision in *West* v. *Klotz*, 37 Ohio State, 420, is to the same effect.

In *Coe* v. *New Jersey Midland Ry. Co.*, 31 N. J. Eq. Reps., pp. 127, 128, the Court said:

"The defendants, Van Houten and Demarest, claim under their judgment, which was recovered January 19th, 1874, in the Passiac Circuit Court, against the Midland Railway Company, for $2,797.71, and also under a deed for a portion of the mortgaged premises acquired by the company for a depot house or station, with its curtilage, in Patterson, and which was sold and conveyed to Van Houten and Demarest by the sheriff of the County of Passiac under their judgment and in satisfaction of part of the amount of it. The judgment was recovered upon a mechanic's lien claim. The work and materials for which it was recovered were furnished, however, subsequently to the recording of the three mortgages. The lien claimed by virtue therof is subsequent and subject to the lien of those mortgages, and consequently the title under the sheriff's deed is subject to the mortgages. The lien for the unpaid balance of the judgment is, of course, subsequent to the mortgages as to the real estate, but as to the chattels it is prior. It is urged that the property sold and conveyed by the sheriff was outside of the line of the railway, and was, therefore, not subject to the mortgages; but it was

properly acquired for the purposes of a station, and was, in fact, adapted and devoted to that purpose by the erection of the building in respect of which the lien was claimed. It was properly connected with the main line of the railroad, and is to be regarded as part of the mortgaged premises."

In *Tommey* v. *Spartanburg & Asheville R. Co.*, 7 Fed. Rep. 429, Bond, Circuit Judge, held:

"Claims of contractors and laborers for labor performed in the construction of a railroad subseqnent to the execution of a mortgage on the road will not be allowed, except as postponed to the mortgage debt, and this, whether or not mechanic's or laborer's liens have been filed in the proper court."

This same case was appealed to the Supreme Court of the United States, and has been decided by this Court under the title of "*Buncombe County Commissioners* v. *Tommey*," 115 U. S. 122. Although I have, in the discussion of my first proposition, quoted, at some length, from the opinion of Mr. Justice Harlan, in that case, I cannot refrain from here re-quoting the following sentences from the opinion:

"The words of the act are scarcely adequate to express a purpose to give a lien upon a public improvement of that character. The words 'building,' 'lot,' 'farm' and 'any kind of property not herein enumerated' are too limited in their scope to justify the conclusion that the Legislature had any intention, by that act, to give a lien upon railroad property. This view is strengthened by the circumstance that, by the subsequent act providing for the organization of railroad companies and regulating their affairs, no saving is made of liens in behalf of mechanic's and laborers, and express

power is given to such corporations to borrow, from time to time, any sums necessary for completing and furnishing or operating their railroads upon bonds secured by mortgage upon their corporate property and franchises. Indeed, the idea of a lien in favor of laborers actually performing work in the construction of a railroad seems to have been intentionally excluded; for, when the railroad contractor fails to pay such laborers, the company, upon notice, may become bound to do so; but no lien is given therefor upon the property of the corporation. * * * A different construction of the statute would enable parties having liens for amounts, within the jurisdiction of Justices of the Peace, to destroy a public highway, and defeat the important objects which the State intended to subserve by its construction. No such intention should be imputed to the Legislature, unless the words of the statute clearly require it to be done."

The principle of law governing this class of cases is well stated in Wood's Railway Law, Vol. 2, Section 292, as follows:

"As against a mortgage executed *before* a mechanic's lien exists, the mortgage generally takes precedence over the lien, as the Legislature has no power to impair the obligation of a valid contract or the lien of duly recorded imcumbrances, or to authorize any act which will have that effect; therefore, unless the lien law existed before the mortgage was executed, and the statute in express terms provides that such liens shall have priority over mortgages, and the road is, when the mortgage is executed, incomplete, so that the mortgagee is chargeable with notice that such liens may arise, the title of the mortgagees will be paramount."

The statutes of each State govern as to cases arising in that State. In Iowa the statute makes the mechanic's lien on the building, erection and improvement for which the lien is claimed a lien "in preference to any prior lien or incumbrance or mortgage upon the land upon which the same is erected." Under this statute, and the construction given to it by the Supreme Court of Iowa, this Court, in *Brooks* v. *Railway Co.*, 101 U. S. 443, and again in *Meyer* v. *Hornby*, 101 U. S. 728, held that mechanic's liens in Iowa are prior and paramount to the liens of pre-existing duly recorded mortgages. But these decisions are based wholly upon, and governed by, the Iowa law.

As has been shown, the Ohio lien law contains no such provision as the Iowa law has. On the contrary, the Ohio lien law clearly provides that mechanic's liens are junior and subject to pre-existing duly recorded mortgages, and so the Supreme Court of Ohio has repeatedly held. These decisions of the Supreme Court of Ohio construing and interpreting the law of Ohio constitute a rule of property in that State.

It is undoubtedly the law of Ohio that a mortgage takes effect from the date it is duly filed for record.

Berrow v. *Cockrill*, 20 Ohio State, 163.

Bloom, and others v. *Naggle, and others*, 4 Ohio State 52.

Kling v. *Ballentine*, 40 Ohio State 391.

It is equally well settled law of Ohio that railroad corporations of that State have the right and power to mortgage all of their present, and future to be acquired, property, together with their franchises to maintain their railroads, and receive compensation for the trans-

portation of persons and property, and all income derived from the use and operation of their railroads and franchises.

Coe v. *The Columbus, Piqua & Indiana R. R. Co.*, 10 Ohio State 373.

Coe, Trustee, v. *Peacock, et al.*, 14 Ohio State 787.

Coopers & Clark v. *Wolf, et al.*, 15 Ohio State 523.

Lane v. *Baughman, et al.*, 17 Ohio State 648.

Walsh v. *Barton, et al.*, 24 Ohio State, 43, 44.

Upon consideration of the lien law of Ohio, and the authorities hereinabove cited, it appears clear that even if this Court could hold that Hamilton acquired a mechanic's lien,—which seems scarcely possible,—still, the Circuit Court erred in decreeing that lien to be prior and paramount to the lien of the First Mortgage of the Toledo, Delphos and Burlington Railroad Company covering the identical property upon which the alleged lien of Hamilton is claimed.

The second clause of my second proposition requires but a brief consideration.

By the decree the Circuit Court, in effect, decreed the alleged lien of Hamilton to be a first and paramount lien upon the entire railroad and property extending from Toledo, Ohio, to Kokomo, Indiana,—utterly regardless of the value of the two lots or parcels of land described in the alleged instrument of lien, and the structure erected thereon by Hamilton.

This we claim to be error. If Hamilton acquired any lien, that lien must be limited to the lots or parcels of land described in the affidavit and statement filed in the recorder's office.

This decree spreads this alleged lien over nearly two hundred miles of railroad, extending through six counties in Ohio and seven counties in Indiana. No possible construction of the Ohio lien law can support this provision of the decree.

The words, "lot of land on which the same may stand or to which it may be removed," found in the lien law, have been carefully considered and construed by the Supreme Court of Ohio. The decisions show that the lien law of Ohio does not include railroads, and that if it did, this decree is erroneous in extending the lien to the entire railroad, extending from Toledo, Ohio, to Kokomo, Indiana.

In *Rutherford & Co. v. Railroad Co.*, 35 Ohio State, pp. 562, 563, 564, the following statements appear:

"The first section manifestly relates to such structures as have a definite locality.

"The words house, mill, manufactory or *other building*, and the words fixture and bridge, each imports, an improvement on a lot of land on which it stands or may be removed to, and the requirement that the lien shall describe the land on which it stands, and shall be recorded in the county where the labor was performed, or machinery or materials were furnished; all point unequivocally to structures having a certain locality, on which they are erected, and from which they may be removed.

"There is no provision, as in case of mortgages for recording these liens in several counties, as would be necessary if they apply to a continuous line of railroad, extending, as this does, through several counties.

"This view is strongly supported, by considering the provisions of Section 3 of said act, which provides, in favor of a head contractor, a lien on a class of im-

provements of the same nature as railroads. There, a lien is given to any person who shall perform labor or furnish materials for constructing, altering or repairing any street, turnpike, road, sidewalk, way or drain, ditch, or sewer, under a private contract with the owner, upon the *abutting* lands, etc. * * *

"Is a railroad a structure, within the meaning of Section 1 of this act?

"That it is a structure, within the general signification of that term, may be conceded. But a reasonable application of the maxim *noscitur a sociis*, when construing the sentence, 'erecting, altering, repairing or removing any house, mill, manufactory or other building or fixture, bridge or other structure,' taken in connection with the provisions that the lien is to be on the same, and on the *lot of land* on which it *stands* or shall be *removed to;* and the further provision that the lien shall be recorded in the county where the work is done, or materials or machinery is furnished, would to our minds, lead clearly to the conclusion that this phrase 'other structures' must be limited to improvements of the same class as those specifically named, and can not be extended so as to include a railroad.

"Again, to call a strip of land, for a right of way for a railroad from Cincinnati to Portsmouth a lot of land, would be a misnomer."

Again, in *Choteau, et al.* v. *Thompson, et al.*, 2 Ohio State, pp. 123, 124, the following definition appears:

"By the words, 'lot of land upon which the same shall stand,' in the same section, is not meant merely the ground covered by the building, nor do they, necessarily confine the lien to the particular lot, as known on the town plat on which the building stands. On the

contrary, where, as in the present instance, two adjacent town lots are used, without any actual division between them, as one mill lot, a part of the buildings and machinery being upon one, and a part upon the other, the lien extends to both lots though the precise spot where the work was done may be within the limits of one of them. And the case is the same, whenever two or more adjacent lots are thrown into one lot, the ideal lines of division being disregarded, and used for a common purpose, whatever that purpose may be."

III.

THE CLAIM OF APPELLEE HAMILTON IS A CONSTRUCTION CLAIM OF AN ORIGINAL CONTRACTOR WITH THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD COMPANY,—BY CONSOLIDATION, SUCCESSOR TO THE TOLEDO, DELPHOS AND BURLINGTON RAILROAD COMPANY,—WHO HAD NOTICE, WHEN HE MADE THE CONSTRUCTION CONTRACTS, FURNISHED THE MATERIALS AND PERFORMED THE WORK FOR WHICH HE NOW CLAIMS PREFERENTIAL PAYMENT, THAT ALL OF THE RAILROAD, RIGHT OF WAY, REAL ESTATE, PROPERTY, BUILDINGS, ERECTIONS STRUCTURES AND APPURTENANCES BELONGING TO, OR AT ANY TIME ACQUIRED BY, THE RAILROAD COMPANY, WERE COVERED AND CONVEYED BY THE FIRST MORTGAGE OF THE TOLEDO, DELPHOS AND BURLINGTON RAILROAD COMPANY EXECUTED JANUARY 17, 1880, AND DULY RECORDED IN LUCAS COUNTY, OHIO, JANUARY 22, 1880.

HAMILTON COULD NOT HAVE, OR ACQUIRE, IN LAW, OR EQUITY, ANY LIEN PRIOR, SUPERIOR AND PARAMOUNT TO THE LIEN OF THE MORTGAGE NOTE SECURED BY THE FIRST MORTGAGE OF JANUARY 17, 1880.

By the public record of the mortgage Hamilton was legally held to know of its existence, and was

legally bound by its provisions and limitations in any construction contracts he made with the Mortgagor Company, or its successor by consolidation.

But, in addition to this legal notice, Hamilton, in his petition, admits actual knowledge of this First Mortgage, and all other mortgages.

When Hamilton gave to the Toledo, Cincinnati and St. Louis Railroad Company,—by consolidation, successor to the Toledo, Delphos and Burlington Railroad Company,—credit for his work and materials, he gave that credit with his eyes open to the fact that everything the railroad company possessed, or might in future acquire, was covered by this First Mortgage. More than that, if he kept himself reasonably informed, he knew, when he made his contracts for the erection of the dock, that the railroad company was then in default in the payment of interest on its First Mortgage Bonds. If, under such circumstances, he saw fit to give credit to the railroad company without any security, he certainly has no right, either legally or equitably, to demand payment out of proceeds of foreclosure sale, in preference to payment upon the First Mortgage.

This Court has so held in an unbroken line of decisions rendered in carefully and exhaustively considered cases. The principle upon which these decisions are based is well and very clearly stated, by Mr. Justice Bradley, in *Galveston Railroad Co.* v. *Cowdrey*, 11 Wall, 480-482, in the following language:

"On the part of Robert Pulsford it is objected that the decree does not give him a priority on that portion of the road which was laid with his iron. He contends that he is entitled to this, first, because when the mortgages of the complainants were executed it was

not in existence, and could not have been conveyed thereby, and can only be enhanced therein on a principle of equitable estoppel, which is rebutted when it comes in conflict with a superior equity; secondly, because his capital applied to the road conserved it, and rendered it capable of being operated, which it would not not have been otherwise; hence, on the principle adopted by the civil and maritime laws of awarding priority to the last creditor who furnished necessary repairs and supplies to a vessel, he is entitled to priority. The counsel for Pickford has furnished us with a very ingenious and learned argument on these points; but we cannot yield to their force.

As to the first point, without attempting to review the many authorities on the subject, it is sufficient to state that, in our judgment, the first, second, and third deeds of trust, or mortgages, given by the Galveston Railroad Company to the trustees, estops the company, and all persons claiming under it and in privity with it, from asserting that those deeds do not cover all the property and rights which they profess to cover. Had there been but one deed of trust, and had that been given before a shovel had been put into the ground towards constructing the railroad, yet if it assumed to convey and mortgage the railroad, which the company was authorized by law to build, together with its superstructure, appurtenances, fixtures, and rolling stock, those several items of property, as they came into existence, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. No other rational or equitable rule can be adopted for such cases. To hold otherwise would render it necessary for a railroad company to borrow money in

small parcels as sections of the road were completed, and trust deeds could safely be given thereon. The practice of the country and its necessities are in coincidence with the rule. The precise case arose in New Jersey thirty years ago. The Morris Canal Company mortgaged its canal, appurtenances, and chartered rights to secure a loan. When the mortgage was given, one section of the canal, that between Newark and Jersey City, although authorized, was not constructed. It was constructed afterwards. Two other mortgages were given upon that part of the canal, one of which was held by the State of Indiana. A bill of foreclosure was filed on the first mortgage, and after argument by very able counsel, Chancellor Pennington held that the first mortgage took priority. The objection was raised that the company did not own any of the land on which the contested portion was constructed when the mortgage was given. 'Can it be possible,' said he, 'that if on the line of the route at any place it should turn out that a deed was obtained for a piece of land since the execution of the mortgage, that such part of the canal is not embraced within it?' Mr. Pulsford, as holder of the fourth mortgage, is an assignee of the railroad company, claiming under it, with full notice of the other mortgages. He is in privity with the company, and is bound by the estoppel. * * * The rails put down on the company's road became a part of the road. The road itself was included in the mortgages of the complainants. Pulsford, by allowing his property to go into or become part of the road, consented to its being covered by the mortgages in question. He acquired no lien which can displace them."

In *Dunham* v. *Railway Co.*, 1 Wall. 266–268, this Court, speaking by Mr. Justice Clifford, said:

1st. It is insisted that the mortgage to the complainant, as trustee for the benefit of the bondholders, does not hold any part of the road except what was built at the time the mortgage was executed and delivered. 2dly. They contend that a contractor, expending money and labor in building a railroad, as in this case, under an agreement with the company that he shall have the possession of the road until he is fully paid, thereby acquires a priority over an older valid mortgage.

Neither of the propositions is based upon any peculiar circumstances in the case, nor are there any such disclosed in the evidence to take the case out of the general rules of law applicable to similar controversies respecting railroad transactions. Nothing of the kind is pretended, and it is obvious that the pretense, if set up, could not be sustained, as there is nothing in the circumstances to distinguish the case from the ordinary course of events in that department of business. Certain persons procured a charter for a railroad, and wanting means to complete it, decided to issue their bonds as a means of borrowing money, and mortgage their road to secure their payment. Railroads, it is believed, have frequently been built in that way, and if it be true that such a mortgage holds no part of the road except what was completed, it is quite time that the rule should be distinctly announced, that the consequences of further misapprehension upon the subject may be avoided. But we are not prepared to adopt any such rule, or to admit that the proposition has any foundation whatever in the facts of this case. On the contrary, we hold it to be clear law that the complainant, as the trustee for the benefit of the bondholders, took the road built and to

be built,' together with all the other matters and things specifically enumerated in the mortgage. Express authority was given to the company by the law of the State to borrow such sums of money as they might deem necessary for completing and operating their railroad, and to issue and dispose of their bonds for any amounts so borrowed. What they wanted was money to enable them to make the road, and the authority was expressly given to authorize them to mortgage it for that purpose. Authorized as this mortgage was by express statute, the the case is even stronger than that of *Pennock et al.* v. *Coe* (23 Howard, 128), where the rights of the parties depended upon the general rules of law. * * * Contractor, under the circumstances, could acquire no greater interest in the road than was held by the company. He did not exact any formal conveyance, but if he had, and one had been executed and delivered, the rule would be the same. Registry of the first mortgage was notice to all the world of the lien of the complainant, and in that point of view the case does not even show a hardship upon the contractor, as he must have known when he accepted the agreement that he took the road subject to the rights of the bondholders. Acting as he did with a full knowledge of all the circumstances, he has no right to complain if his agreement is less remunerative than it would have been if the bondholders had joined with the company in making the contract."

In *Dillon* v. *Barnard*, 21 Wall. 446, the contract of Dillon was a construction contract. In affirming the decree of the Circuit Court rejecting Dillon's claim of priority, Mr. Justice Fields, in announcing the decision of this Court, said:

"The plaintiff made his contract with knowledge of the existing mortgage and of the declaration which it contains, that it is to be the 'first and only lien on the property and franchises of the company,' and that it covered not only property then held by the company, but would also cover all property which might thereafter be acquired. If he had reason to doubt the future solvency of the corporation, or that it would apply the funds it obtained from its bonds to the payment of his work, he should have provided against such a contingency in advance. He cannot now be heard to complain that his expectation of receiving for his work funds not specifically appropriated for his benefit has failed, and to insist that, therefore, he ought to be allowed to follow those funds into property upon which other parties should have by the term of a previous contract the first and only lien."

The decision of this Court, in *Wright, Assignee*, v. *Kentucky and Great Eastern Railway Co.*, 117 U. S. 72, is to the same effect.

In the recent case of *Porter* v. *Pittsburg Bessemer Steel Co., and others*, 120 U. S. 649, the question of the rights and liens of railroad construction contractors as against the holders of First Mortgage Bonds, was again thoroughly considered and decided.

In the opinion of the Court, at page 671, Mr. Justice Blatchford made the following clear and concise announcement of the law:

"The claims of the appellees are for the original construction of the railroad. This is not a case where the proceeds of a sale of the property of a railroad, as a completed structure, open for travel and transportation,

are to be applied to restore earnings which, instead of having been applied to pay operating expenses and necessary repairs, have been diverted to pay interest on mortgage bonds and the improvement of the mortgaged property, the debts due for the operating expenses and repairs having remained unpaid when a receiver was appointed. The equitable principles upon which the decisions rest, applying to the payment, out of the proceeds of the sale of railroad property, of such debts for operating expenses and necessary repairs, are not applicable to claims such as the present, accrued for the original construction of a railroad while there was a subsisting mortgage upon it. These five appellees gave credit to the company for their work. It was construction work, and none of it was for operating expenses or repairs, and none of it went towards keeping a completed road in operation, either in the way of labor or material. When these claims accrued, the road of the company had not been opened for use. The claims accrued after the mortgage had been executed and recorded, and after $1,000,000 of the bonds secured by it had been issued and pledged to innocent *bona fide* holders for value. We are not aware of any well-considered adjudged case, which, in the absence of a statutory provision, holds that unsecured floating debts for construction are a lien on a railroad superior to the lien of a valid mortgage duly recorded, and of bonds secured thereby, and held by *bona fide* purchasers for value. The authorities are all the other way."

This statement marks the line of distinction between claims for labor, supplies and material accrued in operating and maintaining a completed railroad so as to keep it a "going concern," competent to perform its du-

ties to the public, and claims accrued for the *original construction* of a railroad.

Entirely different principles of law are applicable to the two classes of claims.

The above announcement of law, quoted from the opinion of Mr. Justice Blatchford, conclusively shows that the decisions of this Court in *Fosdick* v. *Schall*, 99 U. S. 235, and other cases following that case,—in so far as they give claims for labor, supplies and material accrued in operating and maintaining completed railroads, priority in payment in preference to mortgage bonds,—have no possible application to the case at bar, because the claim of appellee Hamilton is a claim for *original construction*.

From these authorities, it is very clear that Hamilton could not, by reason of his claim for a balance due him for *original construction work*, have, or acquire, in law, or equity, any lien prior and paramount to the lien of the bonds secured by the First Mortgage of the Toledo, Delphos and Burlington Railroad Company, unless such prior lien is expressly given to him by the mechanics' lien law of Ohio.

We have already seen that the mechanics' lien law of Ohio does not apply to railroads and railroad construction claims, and that even if it did, the lien acquired under it would,—under repeated decisions of the Supreme Court of Ohio hereinbefore cited,—be junior and subject to the lien of the First Mortgage. We therefore insist that the decree of the Circuit Court is erroneous under any possible view of the case.

Even if Hamilton's claim had accrued for labor and materials used in operating and maintaining the railroad as a completed railroad, instead of its being, as it is, a

claim for *original construction*, still it could not lawfully be paid out of proceeds of foreclosure sale of the railroad, in preference to the application of such proceeds of sale in payment upon the First Mortgage Bonds. Debts for labor, supplies and material consumed in operating and maintaining a railroad, can take priority and preference over bonds secured by mortgage upon the railroad, *only upon one condition:* That condition is that current earnings of the railroad have been diverted to the benefit of the mortgage bondholders,—either in payment of interest on their bonds or in making permanent improvements upon the mortgaged estate,—leaving current operating debts for labor, supplies and materials unpaid.

That condition does not exist in this case. This record does not show any diversion of current earnings to the benefit of mortgage creditors. There is no claim or pretense that any such diversion ever occurred. On the contrary, any diversion of current earnings is conclusively negatived by the undisputed fact, shown by the record, that for many months prior to the date of the contract with Hamilton, the railroad company had been, and remained, in default in payment of interest upon the mortgage debt. The default in interest, upon which the foreclosure suit was based, occurred January 1, 1883,—nearly three months before Hamilton's first contract was made,—and that default was for the interest on the mortgage bonds from July 1, 1882, to January 1, 1883.

The law on this point is definitely settled by the decisions of this Court.

The principle above stated was first announced in the decision of *Fosdick* v. *Schall*, 99 U. S. 254. In that case Mr. Chief Justice Waite said:

It also shows that even if Hamilton could legally acquire, and did acquire, a mechanic's lien,—which we deny,—that lien must be limited to the two lots of land upon which the dock was partially constructed.

But consideration of this point can scarcely become necessary, because, under the laws of Ohio, interpreted and construed by the Supreme Court of Ohio, Hamilton never acquired any lien.

If any point is suggested by counsel for appellee touching the effect of the consolidation of the Toledo, Delphos and Burlington Railroad Company with other railroad corporations on February 25, 1882, by such consolidation forming the Toledo, Cincinnati and St. Louis Railroad Company, our answer is that no change whatever in the terms, conditions and scope of the First Mortgage of the Toledo, Delphos and Burlington Railroad Company was effected by such consolidation. The Toledo, Cincinnati and St. Louis Railroad Company *is* the Toledo, Delphos and Burlington Railroad Company, in so far as this First Mortgage, and the holders of bonds secured by it, are concerned.

A consolidation of two railroad corporations merges all of the rights, franchises, privileges, duties, obligations and liabilities of each of the old corporations into the new corporation, so that they continue to exist the same as though no consolidation had been effected.

Green County v. *Conness*, 109 U. S. 104.

Shields v. *Ohio*, 95 U. S. 319.

Peik v. *The Chicago and Northwestern Railway Co.*, 94 U. S. 164.

Branch, et al. v. *The City of Charleston*, 92 U. S. 677.

Central Railroad and Banking Company v. *Georgia*, 92 U. S. 665.

It has been my purpose in this brief to establish the following points:

1. That the mechanic's lien law of Ohio does not apply to railroads and their construction. Hence Hamilton acquired no mechanic's lien.

2. That even if Hamilton did acquire a mechanic's lien, that lien,—under the laws of Ohio, and the decisions of its Supreme Court,—is not superior and paramount to the lien of the First Mortgage, but it is inferior, junior and subject to the lien of the First Mortgage: And that even if Hamilton did acquire a lien, it is not only junior and subject to the lien of the mortgage, but must also be limited and restricted,—as such junior lien,—to the two lots of land described in the alleged instrument of lien.

3. That the claim of Hamilton is for *original construction work.* That the Court, therefore, erred in decreeing its payment out of proceeds of foreclosure sale in preference to payment of the First Mortgage Bonds: And that even if Hamilton's claim had been for labor and materials used in the current operation and maintenance of the railroad, still it would not be entitled to priority in payment over mortgage bonds, because no part of the current earnings of the railroad were diverted to the benefit of the mortgage creditors.

We ask that the decree of the Circuit Court may be reversed.

R. G. INGERSOLL, New York, Respectfully submitted,
CLARENCE BROWN, Toledo, O., BY
Solicitors for Appellants. JOHN M. BUTLER,
Of Counsel for Appellants.

Indianapolis, Ind., November 23, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 134.

THE TOLEDO, DELPHOS & BURLINGTON RAILROAD CO., *et al.*, Appellants,

vs.

THOMAS H. HARTLEY.

Appellants' Reply Brief.

By CLARENCE BROWN,

ROBERT G. INGERSOLL, } *Of Counsel.*
JOHN M. BUTLER, }

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 184.

THE TOLEDO, DELPHOS & BURLINGTON RAILROAD COMPANY, ET AL., APPELLANTS,

vs.

THOMAS H. HAMILTON.

APPELLANTS' REPLY BRIEF.

Since appellants' original brief was filed, the briefs for appellee have been submitted. We desire to answer the arguments of appellee's counsel, so far they were not anticipated in our original brief.

The Ohio Lien Laws.

Appellee's counsel state their claim to be (Reply Brief pp. 8, 13) "that a lien on a railroad can be obtained by any contractor, material-man, or laborer, who furnishes labor or material in such construction: not only a lien, but a superior lien to all others": and, "while we insist that under the General Mechanics' Lien Law, as interpreted in that case (Smith Bridge Co. *vs.* Bowman), we have a perfect lien upon this property; we also insist that under an act of the Legislature passed in 1883, and before the work under this contract was done, that we are also protected by the lien therein authorized and provided for."

In their argument to show the policy of the State of Ohio in giving mechanics' liens on railroads, counsel for appellee very adroitly confuse the provisions of the General Mechanics' Lien Law with the Railroad Sub Contractors' Lien Law.

Without now undertaking to restate the provisions of these laws, which are fully stated in our original brief, we desire to point out the distinctions between the different statutes for the purpose of showing, first, that the General Mechanics' Lien Law never gave a lien upon a railroad; secondly, that the lien which it gave was made subordinate to existing liens; thirdly, that the Railroad Sub Contractors' Lien Law was not passed until after the execution of the Toledo, Delphos and Burlington mortgage, and after the dock property came under the lien thereof; and, fourthly, that there was no statutory provision giving a principal contractor, such as Hamilton, a lien upon a railroad until after the completion of Hamilton's contract, and after his attempt to secure a lien under a different statute.

The condition of these laws, with reference to the Toledo, Delphos and Burlington mortgage and the Hamilton dock contract, was as follows:

Section 3184, Revised Statutes of Ohio, 1880, (Appellants' Brief p. 25), gave a general mechanic's lien to the persons and for the purposes therein specified; and section 3207, Revised Statutes of Ohio, 1880, (Appellants' Brief p. 27), gave to railroad sub-contractors a lien, *not upon the railroad or its property*, but upon the money owing to the principal contractor. These were the lien laws in force when the Toledo, Delphos and Burlington first mortgage was made and when the lien thereof attached to the dock property, and also when Hamilton made his original contract. Hamilton endeavored to secure a lien under section 3184. He now endeavors to maintain it under provisions of statutes subsequently passed.

Section 3184 remained unchanged up to the time of the decree in Hamilton's favor. The Supreme Court of Ohio held, in Rutherfoord & Co. *vs.* Railroad Company, 35 Ohio State, 559, that this section did not authorize a lien upon a railroad. A majority of the Supreme Court Commission of Ohio held, in Smith Bridge Co. *vs.* Bowman, 41 Ohio State, 37, that this section did authorize a lien upon a bridge in a railroad, because the language of the statute gave a lien upon "*any bridge*"; the Court holding that these words included a railroad bridge. As the plaintiff in that case was awarded a prior lien upon specific property which could not be severed from the railroad as an entirety, the court decreed a sale of the whole railroad and ordered payment out of the proceeds to protect the mechanic's lien.

It will be noticed, however, that in the case of Smith Bridge Co. *vs.* Bowman, the Supreme Court Commission of Ohio does not attempt to give a lien *upon a railroad*, but confines it to the particular structure named in the statute, viz., the bridge. It has never been held, by any Ohio Court, that this section of the General Mechanics' Lien Law gave a lien upon a railroad.

Section 3207, Revised Statutes of Ohio, 1880, as before stated, gives no lien upon the railroad, or other property of the railroad company. It simply provides a lien upon the amount owing to the principal contractor. This section was amended by the act of April 6, 1883, sixteen days after the date of Hamilton's original contract (Vol. 80 Ohio Laws, 99). The succeeding sections of the same act (§§ 3208–11), for the first time provided for a lien upon a railroad in favor of railroad sub-contractors and those who supplied labor and material under them.

By a declaratory act of April 10, 1884 (Appellee's Reply Brief p. 10), the meaning of the act of April 6, 1883, was declared to be that any person who performs labor or furnishes material, under contract with a railroad company, or any of its authorized agents, shall be entitled to a lien upon the railroad. At best, this declaratory act only enlarged, from the date of its passage, the class of persons in whose favor a lien upon a railroad was authorized; that is, it included persons who contracted directly with the railroad company, or its agents—principal contractors.

This was the first time in the history of Ohio legislation that a lien was given to a principal contractor for work done and material furnished in the construction of a railroad.

But this declaratory act was not passed until long after Hamilton had completed his contract and attempted to secure a lien under the General Mechanics' Lien Law. It could have no retrospective operation. It was effective only from the date of its passage. To declare what the law *is, or has been*, is a judicial power; to declare what the law *shall be*, is legislative.

Ogden vs. Blackledge, 2 Cranch, 272.

We, therefore, contend that neither under the General Mechanics' Lien Law nor the Railroad Lien Law could Hamilton secure a lien upon the railroad, or any part of it.

It is contended that Hamilton was entitled to a lien upon the dock itself and the specific property upon which it was built, upon the principal announced in Smith Bridge Company *vs.* Bowman, 41 Ohio State, 37. This we deny for

the reason that the dock and property in question were part of the railroad property; and, the dock not being a structure specifically mentioned in section 3184, the lien does not come within the principle of Smith Bridge Company *vs.* Bowman, but rather within the principle of Rutherfoord & Co. *vs.* Railroad Company, 35 Ohio State, 559, and Buncombe County Commissioners *vs.* Tommey, 115 U. S., 122.

Priority of the Mortgage Lien.

Even if Hamilton did secure a lien upon the dock and specific property upon which it was built, that lien was inferior to all existing liens, by express language of the Ohio statutes and decisions, as is shown in appellants' original brief.

As the Toledo, Delphos & Burlington Railroad Company and its successor by consolidation did not hold the legal title to the dock property, at any time prior to the taking of Hamilton's lien, it is claimed, upon the authority of Williamson *vs.* New Jersey Southern Railroad Company, 28 N. J. Eq., 277, and 29 N. J. Eq., 311, that the mortgagor railroad companies had only an "unexecuted equity" in the property in question, and that the property came under the mortgage subject to Hamilton's existing lien.

But the cases of Williamson *vs.* Railroad Company rest upon the fact that the first mortgage of the New Jersey Southern Railroad Company did not, by its terms, or in effect, describe or cover the railroad of the Long Branch & Sea Shore Company, upon which the mechanic's lien was secured. It required a judicial decision and decree to bring that railroad within the scope of the first mortgage. In the case at bar, as will be seen by an examination of the terms of the T. D. & B. first mortgage, the property upon which Hamilton's dock was built comes within the express words of the description; the railroad company was in possession of the property as owner; and Hamilton, in his intervening petition, asserts that the land upon which the dock was constructed was owned by the defendant railroad company, although held in trust by Palbon, and "that the labor performed and material furnished by him was performed and used in permanently improving and rendering more valuable the property of the defendant mortgaged to secure the several series of bonds" issued by the several railroad companies named in the pleadings.

It should be noticed, also, in the cases of Williamson *vs.* Railroad Company, that Berthoud & Co., perfected their mechanic's lien against the Long Branch & Sea Shore Railroad Company as owners of the railroad, and also against the New Jersey Southern Railroad Company (with whom their contract was made) as builders. This they were entitled to do by the law of New Jersey.

Under the provisions of the Ohio statutes quoted, relating to mechanics' liens, it is clear that the lienholder's rights must be worked out through the ownership of the property upon which the structure is built. His contract must be with the owner; not necessarily the legal owner, it may be with the equitable owner as well. His lien is upon the interest which the person, with whom he contracts, has in the property upon which the structure is built. If such person has anything less than the entire legal ownership, then the lien of the mechanic is limited to that interest. The moment the railroad company secured its interest in the property in question, it was seized by the after acquired property clause of the mortgage. The railroad company having acquired its interest prior to the making of the contract with Hamilton, and Hamilton's rights depending upon the ownership by the railroad company, and not upon the naked legal title of Ballou, it follows that that interest was incumbered by the first mortgage at the time Hamilton's contract was entered into, and consequently Hamilton's lien upon the railroad company's interest was subject to the prior mortgage lien upon the same interest.

It is true, Hamilton endeavored to assert his lien against the pretended lien of Ballou for moneys advanced. But that controversy presented simply a question as to priority of conflicting liens. The fact that Ballou also claimed a lien could not possibly exalt Hamilton's lien into a lien superior to a prior recorded mortgage. The existence of Hamilton's lien was wholly independent of the existence of Ballou's claim. Hamilton's lien depended upon the ownership by the railroad company; and while the establishment of Ballou's pretended claim of ownership might wholly extinguish Hamilton's lien, the defeat of Ballou's claim could not add to the value of Hamilton's lien so far as the railroad company was concerned, nor relieve it of inferiority to the out standing prior mortgage.

As a matter of fact, Hamilton has no lien or right whatever growing out of Ballou's claims. Without going into a

discussion of the matter, it is sufficient to say that the Master reported (Record p. 73) "that the evidence shows that said contracts (Hamilton's) were made with the Toledo, Cincinnati & St. Louis Railroad Company, as the owner of the property upon which the dock was constructed; *but fails to show that Ballou had any such knowledge thereof as to make him a party thereto, or to estop him from controverting the* (Hamilton) *claim or lien.*" The decree confirms this part of the report.

It is by no means true, as claimed by counsel for appellee, that the Toledo, Delphos and Burlington mortgage was ineffectual to create a lien upon the property to which the mortgagor had less than full legal title. The proposition that a mechanic may secure a lien on the *interest* of the owner in the land, but that the owner cannot, by his own act, create a lien, by way of mortgage, upon the *same interest*, is certainly novel. A mortgage passes the interest of the mortgagor, whatever it may be. Although the mortgage purports to convey a title in fee simple, when the mortgagor has only an equitable title, it is effectual to pass such equitable title; and the record of such mortgage is notice to subsequent purchasers of, and lienholders on, the mortgagor's interest. A mortgage may be made of any imperfect title held by the mortgagor.

Massey vs. Papin, 24 How., 362;
Lincoln B. & S. Ass'n vs. Hass, 10 Neb., 581;
Laughlin vs. Healey, 25 Kas., 147;
Jones on Mortgages, Sec. 138.

And where a railroad mortgage by express terms covers lands that may be subsequently acquired for the uses of the company, as does the Toledo, Delphos and Burlington mortgage (Record, pp. 2, 22, 24), the lien will attach to such lands the moment the company acquires an interest in them, although this interest be only a contract of purchase, the company having paid but part of the purchase price.

Farmers' Loan & Trust Co. vs. Fisher, 17 Wis., 114.

For a much stronger reason would the lien attach where the property had been purchased and paid for by the railroad company, which thereby became the equitable owner, and entered into possession, although the naked legal title rested in a trustee.

The case of Botsford *vs.* R. R. Co., 41 Conn., 454, relied upon by counsel for appellee, is strictly in accord with the principle here asserted. The reason why the lien of the mechanic was awarded priority over the lien of the mortgage in that case was, not because the railroad company had no *legal* title to the premises, but because it had no *equitable* title; the opinion of the court being stated in this language, page 469: "We think the owner of the premises was not divested of his title, and that *no equitable title* accrued to the railroad company prior to January 17, 1871, at which time the lien of the plaintiff attached, necessarily taking precedence of the mortgages in question."

The case of Anketel *vs.* Converse, 17 Ohio State, 11, does not, in our judgment, announce any principle inconsistent with that here maintained. In that case the owner of the property was indebted to his grantor for the purchase price, and, being so indebted, sold the land by executory contract to another, and received the consideration therefor. The owner was therefore indebted, to the one for purchase money due, and to the other for purchase money paid. As between these two, the equities were equal, in point of merit; and the court held that the purchaser by the executory contract acquired no superior equity as a *bona fide* purchaser without notice, because he did not acquire the legal title. It is difficult to see how this principle is applicable to the case of Hamilton. His lien was no more a "legal" lien than was the lien of the prior recorded mortgage. Both liens were upon precisely the same interest owned by the railroad company. Hamilton acquired his lien with full knowledge of the pre-existing recorded lien of the mortgage, and his subsequent lien has no superior equity or firmer legal standing.

It is urged that the mortgage was executed by the Toledo, Delphos and Burlington Railroad Company, whereas, the property upon which Hamilton constracted the dock was acquired by the Toledo, Cincinnati and St. Louis Railroad Company, the successor by consolidation of the Toledo, Delphos and Burlington company; and that, therefore, the future acquired property clause of the Toledo, Delphos and Burlington mortgage did not operate as against property acquired by a company other than the mortgagor.

Without conceding the correctness of this position, it is difficult to see how it can avail Hamilton upon this appeal. The only effect which that claim can have is to exempt the dock property from the lien of the mortgage, and thereby deprive Hamilton of any right of participation in the proceeds of sale of the mortgaged premises. Either the mort-

gage covered the dock property, or it did not. If it did then it covered it from the moment the property was acquired, and is the first lien; and the decree awarding Hamilton a first lien should be reversed. If it did not, then the dock property, not being a part of the mortgaged premises, could not be sold under the decree of sale, Hamilton was entitled to no part of the proceeds of sale of the mortgaged premises, and the decree awarding him priority in payment out of such proceeds should be reversed.

Appellee's Briefs.

A few statements in the briefs of appellee require answer or explanation. In their attempt to support the claim that the Hamilton dock was completed by the receiver, and, therefore, the court should authorize the payment of the claim out of the fund arising from the sale, there being no net earnings, counsel for appellee say (Original Brief, pp. 1, 17, 18) that, "on the 1st day of August, 1883, on the application of the trustee for the bondholders, the railroad was placed in the hands of Edward E. Dwight as receiver;" and again: "The insolvency of the railroad company and the appointment of a receiver were enforced by the Central Trust Company, of New York, as trustee for the appellants. This insolvency and the appointment of a receiver was enforced while Hamilton was working with his gang of men and machinery at the construction of the docks in question, and before they were completed;" and again: "The receiver was appointed at the instance and request of the appellants through their trustee, and if anyone should be and is bound by the acts of the receiver, the appellants are." And after stating what was done by the receiver, they say: "And all this was done by the court under a proceeding initiated by the appellants."

These statements are all erroneous. As will be seen from the record (page 10) the trustee's bill to foreclose the mortgage, was not filed until October, 1883. The proceedings under which Dwight was appointed receiver, on August 1, 1883, were proceedings instituted by a judgment creditor; and neither the appellants nor the trustee under the mortgage were, in any manner, responsible for the conduct of that litigation, or the acts of the receiver appointed in that case.

It is difficult to reconcile the different positions taken by counsel for appellee. They assert that "the whole property of the railroad company, including this dock property, was sold as an entirety, and purchased by the bondholders;" and, "that the entire work went to the enhancement of the value and the betterment of the property securing the bonds of those who eventually became the purchasers of the road, and are now appellants herein."

If these statements are true, it is not clear how it can be said, as counsel assert in endeavoring to maintain their second proposition, "that the premises in dispute were never acquired by the railroad company that executed the mortgage."

If the premises were not acquired by the mortgagor company, or by a successor under such circumstances as to bring the premises under the mortgage, it is not very apparent how the work of Hamilton went to the enhancement of the value of the property mortgaged to secure the bonds, or how the court, decreeing the sale of the mortgaged premises by the exact terms of description contained in the mortgage, could include therein property not covered by the mortgage.

The interest of the railroad company in the dock property did not depend upon the decree in Hamilton's favor; but that decree depended upon the ownership of the dock property by the railroad company. It was essential, under the laws of Ohio, that the railroad company should have an interest in the property to give effect to Hamilton's lien; and the decree that established his lien, and fixed its priority, found, as a preliminary fact, that the railroad company had such an interest as enabled Hamilton's mechanic's lien to attach. But that very finding of the interest in the railroad company establishes the priority of the mortgage lien. Nothing transpired, between the time the property was purchased and the time of the Hamilton decree, to change the interest possessed by the railroad company. The very foundation of the decree was the fact that, prior to the date of the Hamilton contracts, the railroad company had become the *owner* of the property upon which the dock was built. No other finding would have permitted the establishment of Hamilton's lien, and that very finding established the priority of the mortgage lien.

Respectfully submitted,

CLARENCE BROWN,
Solicitor for Appellants.

Toledo, O., January 2, 1890.

Office Supreme Court U. S.
FILED
DEC 9 1889
JAMES H. MCKENNEY
Clerk

Supreme Court of the United States.

October Term, 1889.

THE TOLEDO, DELPHOS & BURLINGTON R. R. CO., ET AL,

Appellants,

VS.

THOMAS H. HAMILTON,

Appellee.

BRIEF FOR APPELLEE,

BY

JOHN H. DOYLE, his Solicitor.

Supreme Court of the United States.

October Term, 1889.

THE TOLEDO, DELPHOS & BURLINGTON R. R. CO., ET AL,

Appellants,

VS.

THOMAS H. HAMILTON,

Appellee.

BRIEF FOR APPELLEE,

BY

JOHN H. DOYLE, his Solicitor.

THE FACTS.

In the spring and summer of the year 1883, Thomas H. Hamilton, the appellee, built 500 feet of crib dock on the Maumee river, for the Toledo, Cincinnati & St. Louis Railroad Company, the name adopted after the consolidation of several railway companies, of which the Toledo, Delphos & Burlington Railroad Company, appellant, was one. On the first day of August, 1883, on the application of the Trustee for the bondholders, the railroad was placed in the hands of Edward E Dwight as receiver. The dock was almost completed when the receiver took possession, but not entirely, and about fifteen days were required, after the appointment and possession of the receiver, to

finish the work. The work was done to the satisfaction of the railroad company and at the request of the receiver, and there is no dispute as to the amount due Mr. Hamilton when the work was completed, which was arrived at from the estimates of the railroad company, and fixed at $27,861.80.

On the 30th day of August, 1883, Hamilton took the necessary steps under the statutes of the State of Ohio to perfect and assert his lien on the dock, for the labor performed and material furnished in its construction.

One George W. Ballou held the legal title to the lands on which the dock was built, and in the court below, asserted his legal ownership against the claim of equitable ownership on the part of the railroad company, and on this issue the court found for the railroad company and against Ballou, who has not appealed. But at the time the contract was made, the work done and lien perfected by Hamilton, the railroad company had no legal title to the lands on which the dock was located, and has none yet except as acquired under the decree in favor of Hamilton. And when Hamilton perfected his lien, it was done as against Ballou (who was privy to the construction of the dock) as legal owner, as well as against the railroad company, as equitable owner.

It further appears that The Toledo, Delphos & Burlington Railway Company was incorporated under the laws of the State of Ohio, by filing in the office of the Secretary of State, on May 7th, 1879, articles of

consolidation between The Toledo & Maumee Narrow Gauge Railroad Company, The Toledo, Delphos & Indianapolis Railway Company, The Delphos & Kokomo Railway Company, and The Delphos, Bluffton & Frankfort Railroad Company.

After this and on the 17th day of January, 1880, this consolidated railway company executed the mortgage which it is claimed, covers the premises here in controversy, and is a lien prior to the lien claimed by Hamilton.

After the execution of this mortgage, and on the 21st day of June, 1880, The Toledo, Delphos & Burlington Rail*way* Company, as then constituted, was again consolidated with The Dayton, Covington & Toledo Railroad Company, under the name of "The Toledo, Delphos, & Burlington Rail*road* Co."

And again, on the 18th of March, 1881, The Toledo, Delphos & Burlington Railroad Company, as then constituted, was again consolidated with The Dayton & Southeastern Railroad Company, but still retained the name of "The Toledo, Delphos & Burlington Rail*road* Co."

And after this last consolidation, and on the 31st day of March, and the 2d day of April, 1881, The Toledo, Delphos & Burlington Railroad Co., as then constituted, purchased the lands upon which the Hamilton docks were built, and took the title thereto in the name of George W. Ballou.

In the final disposition of the Hamilton branch of the case, the court below found the amount due to

Hamilton to be as above stated; that he had a lien on the specific dock property for that amount, with interest; and as all the property of the railroad company, including this dock property, was to be sold as an entirety, under the prayer of the trustee of the bondholders, who are the real appellants here, the court ordered that this judgment be first paid from the proceeds of the sale, before distribution be made to the bondholders. In compliance with this decree, the whole property of the railroad company, including this dock property, was sold as an entirety, and purchased by the bondholders with full knowledge of the Hamilton decree; and it is from this decree, and to avoid the payment of the Hamilton claim that this appeal has been perfected.

The question then is, has Hamilton any claim, legal or equitable, on this railroad property for his labor and material put upon it, as against the holders of bonds which are secured by a mortgage antedating Hamilton's claim, and covering after acquired property?

ARGUMENT.

It is conceded that Hamilton did his work well; that the railroad company has received from him all that was required or expected under the contract; that the entire work went to the enhancement of the value and the betterment of the property securing the bonds of those who eventually became the purchasers of the road, and are now the appellants herein; that Hamilton received no pay for his work or material, and the present appellants have all the benefits thereof without pay.

Under these facts the decree of the court below cannot be deemed other than equitable and righteous, and we do not think it will be disturbed by this tribunal.

When Mr. Butler, counsel for appellants, argued the case before the Master, he was constrained to say, on page 76 of his printed argument, "I am willing to concede that if there is any possibility in law and in equity for Mr Tom Hamilton to get pay for that dock, I want him to get it; but I do not believe he can get it in the way he is pursuing here. I concede that it is a case of extreme hardship."

And the Master in his report, which is part of the record here, says, "As counsel for all parties in argument conceded the strong equities of this claimant, and rather urged its recognition to be protected by law, I report," etc. So it appears that the justice and equity of this claim is fully admitted by all parties to the suit, and the only obstruction in the way of payment is some legal difficulty which the appellants seem to regret as much as Mr. Hamilton. We hope this court may find a way to remove these legal difficulties that are causing such universal regret.

Our first claim is that the mechanics lien of Hamilton should have precedence, by reason of priority, over the lien of the first mortgage bondholders.

On the 30th day of August, 1883, Hamilton perfected his lien on the docks which he had built, at which time the railroad company had no title to the premises, the title to said property being in Geo. W. Ballou. As

the railroad company, the mortgagor, had no title at this time to the property in question, no title, or lien, could pass at this time from the mortgagor to the mortgagee. The mortgagee had no legal lien upon this property until his mortgagor had a legal title to it: in fact, the mortgagor could not create a legal lien upon any property to which he had not the legal title. If at this time the mortgagor had an equitable interest in the property in question, then as between the mortgagee and mortgagor, under the after acquired property clause of the mortgage, an unexecuted equity might exist, which under a decree of a chancellor, might be exalted into a legal lien, but without such a decree, fixing the ownership of the legal title, no legal lien is created. But at this date Hamilton acquired a legal lien under the laws of the State of Ohio, and his legal lien dates, at the least, from that time, when the appellants had at the most an unexecuted equity, or an equitable right to acquire a lien.

In the case of Williamson, Trustee, vs. the New Jersey Southern Railroad Company, reported in 28th N. J. Eq. 277, (Chancery Court,) and again in 29th N. J. Eq. 311, (Court of Errors and Appeals,) we find a very similar state of facts to the case at bar.

In that case the defendant Railway Company had executed a mortgage, with the usual "after acquired property" clause in it, which was recorded in the county where the property in dispute was located, in September, 1869; in the summer of 1870 it became the equitable owner, and took possession of the property upon which a mechanics' lien was afterwards acquired, being

a branch railroad, but it did not acquire the legal title until the 20th of February, 1877, when the Chancellor by decree declared that the railroad in question became the property of the mortgagor company. In the meantime Barthoud & Co., on the 23d of July, 1874, built docks, wharfs and piers at the terminus of the branch railroad in question, and under the laws of New Jersey perfected a mechanics lien on the docks, piers, etc., before referred to. In disposing of this case both the courts found that the mechanics lien of Barthoud & Co. was prior and superior to the lien of the first mortgage.

In their opinions the courts say, 28th N. J. Eq., p. 295: "At the time of making this contract (upon which the mechanics lien was based), the Southern Railroad Company were in possession of the Long Branch & Sea Shore Railroad, and under the power given by act of the Legislature had effected substantially a consolidation of the two companies. So that the railroad of the Long Branch & Sea Shore Company and its appurtenances were, in fact, in equity the property of the Southern Company. Their ownership was only equitable, however. The legal title to the property still remained in the Long Branch & Sea Shore Company." And continuing the same subject, in Vol. 29, N. J. Eq., p. 316, the court says: "No consolidation in fact of the two companies was ever effected; nor was the railroad of the Long Branch & Sea Shore Company acquired by the New Jersey Southern Company by any formal purchase or conveyance. The latter company became the owners of 1619 shares of the 1718 shares of the capital stock of the former company, and in the summer of 1870 took possession of the railroad of the Long

These cases are all directly in point and fully maintain the position we have assumed: we hope the court will examine them.

In the argument of the case before the Master, it was urged by the appellants that if the mortgagor had not such title to the property, at the time the mechanics lien attached, as to place it under the after acquired property clause of the mortgage, then neither had the mortgagee such a title that the mechanic could acquire a lien, and this was urged in view of the section of the statute of the State of Ohio under which the lien was perfected, section 3184, which is as follows:

"A person who performs labor or furnishes machinery or material for constructing, altering or repairing a boat, vessel or other water-craft, or for erecting, altering, repairing, or removing a house, mill, manufactory, or other building, appurtenance, fixture, bridge, or other structure, by virtue of a contract with the owner or his authorized agent, shall have a lien, to secure the payment of the same, upon such boat, vessel, or other water-craft, or upon such house, mill, manufactory, or other building, or appurtenance, fixture, bridge, or other structure, and the interest of the owner in the lot of land on which the same may stand or to which it may be removed."

It will be noticed that the lien is given by the statute on the *interest of* the owner in the lot of land on which the improvement may stand, and the Supreme Court of the State have expressly passed on this point in Chobean vs. Thompson, 2nd O. S., 114, and in Dutro vs. Wilson, 4th O. S., 101, where they say that the owner need not be the owner in fee.

The difference in the two liens is this: It requires

the act of the mortgagor to give a mortgage lien, he must acquire the title to the property, and must execute the mortgage; but to acquire a mechanics lien the person interested in the lot of land need do nothing, all the acting and doing is done by the mechanic, under the direction of the statute, and in this case all the provisions of the statute have been complied with and the lien is perfected.

We have so fully quoted from Williamson, Trustee, vs. Ry. Co., because of the similarity existing between it and the case at bar; but the same principles are announced in many other cases, and are in the main elementary. That is to say, it is an elementary principle that "where there are equal equities, the first in order of time shall prevail," and "where there is equal equity, the law must prevail." Pomeroy in his work on Equity Jurisprudence, sec. 678, says:

"The meaning of the second maxim is: If two persons have equal equitable claims upon, or interests in, the same subject-matter; or, in other words, if each is equally entitled to the protection and aid of a court of equity, with respect of his equitable interest, and one of them, in addition to his equity, also obtains the legal estate in the subject-matter, then he who has the legal estate will prevail."

The author in a foot note cites Fitzsimmons et al. vs. Ogden et al, 7th Cranch, page 2, and several other authorities.

Further along, in sec. 682, the same author says: "Between a legal and equitable title to the same subject matter, the legal title in general prevails, in pursuance of the maxim, 'when there is equal equity, the law

must prevail," and gives a large list of authorities, among which is Boon vs. Chiles, 10 Peters, page 177.

We will also call the attention of the court to Bayley vs. Greenleaf, 7 Wheat., page 46, where the equitable lien of a vendor was interfered with by an intervening legal interest, and the court say:

"The lien of the vendor, if in the nature of a trust, is a secret trust; and although to be preferred to any other subsequent equal equity, unconnected with a legal advantage which gives a superior claim to the legal estate, will be postponed to a subsequent equal equity connected with such advantage."

In Fain vs. Inman et al., 6th Heiskell (Tenn.), p. 5, in discussing this matter, with reference to vendor's liens, the court, quote the words of Chief Justice Marshall in the case last cited, and further says:

"It is not a lien until a bill has been filed to assert it; before that is done, it is a mere equity or capacity to acquire a lien, and to have satisfaction of it. When a bill is filed, it becomes a specific lien."

So say we in the case at bar; until the mortgagor acquires the legal title, the mortgagee acquires no lien, but only "a mere equity or capacity to acquire a lien"; and not, at least until a bill is filed, and perhaps not until a decree is rendered, does it become a specific lien.

In Botsford vs. Railroad Co., 41 Conn., page 454, this principle is also recognized. In this case a land owner agreed with a railroad company that he would give the land for a depot if the company would erect a building for the purpose on the land. The company

agreed to do so and employed the petitioner to do the mason work. When the work was done the mechanic filed a certificate of his lien. The company began to use the place as a station immediately after making the agreement with the land owner, and before this building was commenced, taking and delivering passengers and freight there, and continued such use until the building was completed; no conveyance of the land was ever made by the owner. The company had previously made two mortgages of the entire franchise and property of the road, the mortgages providing in express terms that they were also to cover all lands and buildings that might afterwards be acquired by or belong to the company: Held, that as between the liens of the mortgagees and mechanic, the mechanic had priority and preference.

In Anketel vs. Converse, 17 O. S., p. 11, we again find the matter considered with the same result. In this case a vendor took of his vendee a mortgage to secure a part of the purchase money, and entrusted the mortgage to the vendee to be delivered for record. Before so delivering the mortgage, the mortgagor sold the land by written executory contract, to a bone fide purchaser, who paid him therefor a full and valuable consideration, without notice of the rights of the mortgagee. The written contract bound the mortgagor to make a good and clear title, *but gave no present legal title or right of possession.* Before the mortgagee had any notice of the rights of the contract purchaser, and before the latter had acquired any legal title, or had taken actual notorious possession, the mortgage was recorded. Held: that the mortgagee had a lien superior to the

rights of the purchaser, on the strength of the principles hereinbefore announced. That is to say, that before the record of the mortgage, both the mortgagee and purchaser had equities in the land to the extent of their respective interests, but when the mortgage was recorded, that raised the lien of the mortgagee from an equitable to a legal one, and gave it preference over the lien of the purchaser, which still remained an equitable lien only.

SECOND.

We claim that the premises in dispute were never acquired by the railroad company that executed the mortgage, that was the basis of the suit below, and the priority of which is asserted as a lien against the mechanics lien of Hamilton.

By an examination of the state of facts before given, which is verified by the record, it will be seen that The Toledo, Delphos & Burlington Railway Company was incorporated under the laws of the State of Ohio, on May 7th, 1879; as then constituted it executed the mortgage in question on the 17th day of January, 1880. On the 21st day of June, 1880, this company as then constituted was consolidated with The Dayton, Covington & Toledo Railroad Company under the laws of Ohio, and the consolidated company took the name of "The Toledo, Delphos & Burlington Railroad Company."

And again, on the 18th day of March, 1881, The Toledo, Delphos & Burlington Railroad Company was consolidated under the laws of Ohio, with the Dayton

& Southeastern Railroad Company, but after the consolidation retained the old name of "The Toledo, Delphos & Burlington Railroad Company."

And now, after these two consolidations, which were effected after the execution of the mortgage in question, this new consolidated company, on or about the first day of April, 1881, acquired the property on which the Hamilton dock is located, taking the legal title thereto in the name of George W. Ballou.

At the date, when this property is claimed to have been acquired, the company which made the mortgage, had gone out of existence, so far as its powers of acquiring property were concerned, and could not acquire the premises in question; it had been consolidated and reconsolidated between the dates of making this mortgage and acquiring this property, and the old organization could no more get title, or become the owners of these premises at the date of the conveyances to Ballou, than could a person long since dead and gone. These several consolidations were made under the laws of Ohio, passed April 10th, 1858, Swan & Critchfield, page 327 and section 5 of this act defines the specific purposes for which the constituent companies may still exist, in these words: "Provided, that all rights of creditors, and all liens upon the property of either of said corporations shall be preserved unimpaired, and the respective corporations may be deemed to be in existence to preserve the same." That is to say, that the existence of the constituent companies is preserved, for the sole purpose of keeping unimpaired all liens upon the property these companies then owned; but

no existence is perpetuated for the purpose of acquiring property, nor could any such purpose be contemplated.

In Shields vs. Ohio, 5th Ohio, 319, this court has passed upon this very question, in the construction of this Ohio statute. Justice Swayne in his opinion uses this language:

"The Legislature had provided for the consolidation. In such case, before it took place, the original companies existed and were independent of each other. It could not occur without their consent. The consolidated company had then no existence. It could have none while the original corporations subsisted. All—the old and the new—could not co-exist. It was a condition precedent to the existence of the new corporation that the old ones should first surrender their vitality and submit to dissolution. That being done, *eo instanti* the new corporation came into existence. * * * * * * *

When the consolidation was completed, the old corporations were destroyed; a new one was created, and its powers were "granted" to it, in all respects, in the view of the law, as if the old companies had never existed, and neither of them had ever enjoyed the franchises so conferred. The same legislative will created and endowed the new corporation. It did one as much as the other. In this respect, there is no ground for any distinction."

The views here expressed are sustained by several well considered cases exactly in point. One of them embodies the unanimous judgment of this court. I refer to Clearwater vs. Meredith, 1 Wall., 25.

The Supreme Court of Ohio has also construed this same statute in the same way, in Shields vs. Ohio, 95 U. S., 86, and in Ohio vs. Sherman, 22 O. S., 411.

Many other authorities to the same effect could be cited, among which are:

McMahon vs. Morrison, 16 Ind., 172.

Railroad Company vs. Georgia, 98 U. S., 359.

Lauman vs. Lebanon Valley Railroad Co., 30 Pa. St., 42.

Indeed, I can find no authorities to the contrary.

THIRD.

The Court will remember that the appellants are the bondholders in this case, and that the insolvency of the Railroad Company, and the appointment of a receiver, were enforced by the Central Trust Company of New York, as trustee for the appellants. This insolvency, and the appointment of a receiver was enforced while Hamilton was working with his gang of men and machinery at the construction of the docks in question, and before they were completed. The receiver was appointed, and took possession of the property on the first day of August, 1883, and the docks were not completed until the 15th of that month. The record will show that when the receiver took possession of the property, he found the docks in process of construction, and under his authority the work was continued and completed. He found that unless the work was continued and completed, there was great danger that what had already been done would be lost and destroyed. Yet Mr. Hamilton has not been paid for even that portion of the work done under the authority of the receiver.

The receiver was appointed at the instance and request of the appellants, through their trustee, and if

any one should be and is bound by the acts of the receiver, the appellants are. The receiver, upon his appointment and assuming possession, adopted the contract before made by the company, and authorized the completion of the work according to the terms thereof. The receiver is the executive officer of the court, and his acts are the acts of the court, so that the court by its officer duly authorized in the premises adopted the contract for the construction of this dock and authorized its completion according to its terms; and all this was done by the court under a proceeding initiated by the appellants. It will require strange rules of equity to prohibit a court from paying a mechanic for his work and material, done and furnished, under a contract which met the approval and adoption of the court, and which work and material went directly to enhance the value of the security of those at whose instance the court had interfered, and who are now the appellants. If the appellants maintain their position, as asserted here, they will get the full benefit of Hamilton's work and material, and Hamilton will get no pay, *not even for the labor and material furnished during the last fifteen days of his job*, which was all done under the authority of the appellants through the officer of the court whose assistance they had implored. It will be strange law, strange equity and strange justice, that will thus wrong a poor mechanic to the pecuniary aggrandizement of a few capitalists. It is settled that the mortgage trustees represent the bondholders secured by the mortgages.

Thompson vs. Canal Co., 94 U. S. 741.

Kerrison vs. Stewart, 93 Ind. 160.

And Justice Bradley has said in Wallace vs. Loomis, 97 U. S. 163:

"The bondholders were represented by their trustees and must be regarded as bound by their acts, at least so far as the interests of other persons acting upon the faith of it might be affected."

FOURTH.

We will call the attention of the court to but one other feature of this case. It has already been suggested that all the work and material went to the enhancement of the security of the appellants; that if they should prevail in this suit, they will be the sole gainers, and Hamilton the sole loser. Is it possible that there is no power in a court of equity to equalize these gains and losses?

We are aware that this court has gone far to protect litigants situated as Hamilton is, and are also aware that the court have drawn a line between work and materials furnished for the maintenance and operation of the road, and work and materials furnished for the construction of the road itself; but we urge that the peculiar circumstances of this case clearly bring it within the class of material men included in the first paragraph of the rule, and it would be an arbitrary hardship to exclude this laborer, and favor another, only because the labor and material of the one went to enhance and protect one portion of the premises, while the labor and material of the other unfortunately happened to be classed as "construction."

This court, in the well-known case of Fosdick vs.

Sebnll, 96th Otto, 235, has used some very strong and apt language, to which I will take the liberty of calling your attention.

In this case Chief Justice Waite says:

"Every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income."

And farther along the court says:

"The mortgagee has his strict rights, which he may enforce in the ordinary way. If he asks no favors, he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion; and the chancellor should so mold his order that, while favoring one, injustice is not done to another. If this cannot be accomplished, the application should ordinarily be denied.

"We think, also, that if no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made out of earnings which ought in equity to have been employed to keep down debts for labor, supplies and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business. This, not because the creditors to whom such debts are due have in law a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders;

and if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into his hands as, if practicable, to restore the parties to their original equitable rights. While ordinarily this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require *the use of the proceeds of the sale of the mortgaged property in the same way.* Thus it often happens that, in the course of the administration of the cause, the court is called upon to take income which would otherwise be applied to the payment of old debts for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipment. In this way the value of the mortgaged property is not unfrequently materially increased."

And right after this quotation, the court farther says:

"No fixed inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must to a greater or less extent influence the chancellor when he comes to act."

The court will specially notice the following part of the above quotation:

"While ordinarily this power is confined to the appropriation of the income of the receivership, and the proceeds of the moneyed assets that have been taken from the company, cases may arise when equity will require *the use of the proceeds of the sale of the mortgaged property in the same way.* Thus it often happens that, in the course of the administration of the cause, the court is called upon to take income which would otherwise be applied to the payment of old debts for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipment. In this way

the value of the mortgaged property is not infrequently materially increased.

If now the court is justified in taking from *the proceeds of the sale of the mortgaged property, to pay laborers*, because the income of the road, that should have been used to pay their labor claims, had been diverted to make permanent improvements, how much more should a court of equity be authorized to take from the proceeds of the sale of the mortgaged properties, to pay a laborer who furnished the money from his own pocket to make such permanent improvements?

The language of the court seems without force, if it cannot protect this mechanic in his extremity.

The amount is so large that the court will know that it is a matter of financial life or death to Hamilton: he has been kept out of his money now for more than six years; and as all the parties agreed in the beginning that he ought to be paid, if only the court could find a way to affirm the decree of the court below, we feel confident that the resources of the court are not so small as to withhold from him an adequate remedy.

John K. Boyle
for Appellee

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Supreme Court of the United States.

OCTOBER TERM.

THE TOLEDO, DELPHOS AND BURLINGTON RAILROAD COMPANY, THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD COMPANY, JAMES M. QUIGLEY, CHARLES T. HARBECK, AND JOHN MCNAB,

Appellants.

VS.

THOMAS H. HAMILTON,

Appellee.

CASE NO. 184.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OHIO.

IN REPLY TO APPELLANTS' BRIEF.

JOHN H. DOYLE,
Solicitor for Appellee.

Supreme Court of the United States.

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IN REPLY TO APPELLANTS' BRIEF.

The first proposition in the brief of Appellants is, that the Statutes of Ohio do not give to Hamilton a mechanic's lien upon the property claimed by him to be affected; and to maintain this, Buncombe County Commissioners vs. Tomney, et al., 115 U. S. 122, is cited.

We ask the Court to carefully examine this case, as it is simply an effort of the Court to interpret the mechanic's lien law of the State of North Carolina with reference to railroads, unaided by any decision of the question by the Supreme Court of that State; for the Court say in prefacing their opinion:

"We are of opinion that no such statutory lien exists in North Carolina, or was intended to be given by the act of 1870. In reaching this conclusion, we are not aided by any direct decision of the question by the Supreme Court of North Carolina."

But in the case at bar, it is the mechanic's lien law of the State of Ohio that comes before the Court for interpretation; and in making this interpretation, the Court is materially aided by direct decisions of the Supreme Court of the State of Ohio.

Counsel for Appellants has kindly called our attention to the two cases in Ohio, where he very truly says the question is "definitely settled."

The first is Rutherford & Co. vs. Railroad Co., 35 Ohio State, 559, from which counsel quote with discriminating sagacity. By an examination of this case the Court will find that the mechanic sought to put his lien upon the entire railroad from Cincinnati to Portsmouth, and not on any specific lot of land or structure thereof. The Court in closing their opinion, say:

"It is enough to say that no such claim is made in the pleadings. The only point presented by the record is properly stated by plaintiffs' counsel in these words: 'Can a mechanic's lien be taken on a *railroad* of the kind set out in the pleadings, under the laws of the State of Ohio?' The lien sought is on a strip of land from Cincinnati to Portsmouth, and the railroad constructed and projected thereon, including bridges, culverts, trestles, and everything necessary to a completed road. No bridges are specified, nor is any lot of land on which they stand described. The petition does not state the cost of these bridges nor pray for a lien thereon, but upon the railroad as an entirety. *Whether or not such a lien could be taken upon a railroad bridge, built under a specific contract for that purpose, is not decided.*"

This much of the opinion explains the whole case, and shows that the real question in issue, as to whether a mechanic could perfect a lien upon a depot, water-tank, bridge, dock or other specific structure on a specific lot of land, was not passed upon by the Court, and the Court took special pains to say that it was not passed upon, and although counsel have quoted freely and fully from this opinion, they have with great care omitted this declaration of the Court.

But this question, which the Court in this case declined to pass upon, came up, soon thereafter, before the Supreme Court of Ohio, in Smith Bridge Company vs. Bowman, 41st Ohio State, 37, and was there definitely settled. This was a case where a mechanic sought, under the Statutes of Ohio, to perfect and maintain a lien for work and material on railroad bridges, and the Court fully sustained him in his efforts. In introducing their opinion, the Court say:

"The first question presented in this case is: 'Did the act of May 4, 1877, (74 Ohio Laws, 168), give the plaintiff in error a lien upon the bridges constructed by it under its contract with the railroad company, and in accordance with the allegations contained in the second count of the answer and cross-petition?' This question is an unsettled one in Ohio, and the Supreme Court, in the case of Rutherford & Co. vs. Railroad Co., 35 Ohio State, 559, was careful to say that it did not decide whether or not a lien like the one now claimed could be taken."

And farther along, in discussing the rights of the mechanic as against bond mortgages in the light of the laws of Ohio then governing the organization of railroad companies, and the building of railroads, the Court uses the following strong language:

"Such is the theory of our law in regard to railroad building. The right of a mechanic or builder to have a lien upon a railroad bridge will not interfere with or embarrass companies, who propose to build railroads in this way. It may interfere with companies proposing to build railroads entirely upon borrowed money and without any paid up capital stock. If the giving of these liens will have a tendency to cause the theory of our statutes to be practiced, the statute giving the lien is in accord with sound public policy and is promotive of the value and permanency of railroad securities.

"In Railroad vs. Lewton, 20 Ohio State Reports, 401, it was held that one who sold a strip of land to a railroad company to be used as a part of its right of way and roadbed, has an equitable lien upon the land so sold. And it was further held in the same case, that 'when the right of the public to maintain the continuity of a public highway precludes the right to sell a section of a railroad, a necessity arises to decree the sale of the whole road in order that equity may be done.'

"In this case, the right of the public to maintain the continuity of the Springfield, Jackson & Pomeroy railroad pre-

cludes the right to sell the section or sections of the railroad upon which these bridges are situated. It follows, then, that to protect the lien of the mechanic, the sale of the whole road must be decreed."

This seems to be a full and complete interpretation of the mechanic's lien law of Ohio, by the Supreme Court of the State, so far as the questions of this case are presented, and as this interpretation and decision become a rule of property in the State, the Supreme Court of the United States will of course follow it.

Counsel say:

"As is well known and recognized in Ohio, the Supreme Court Commission was only a temporary expedient, for the relief of the docket of the Court: Its decisions have never been regarded in Ohio, or elsewhere, as authority as high as the decisions of the regular Supreme Court."

This is not true. The Supreme Court Commission, under the constitution, ranks with the Supreme Court proper, and is in every respect considered its equal. The Supreme Court is elected by the people, and the Commission is appointed by the Governor, and between Courts elected and appointed, experience has taught us to give decided preference to those appointed by a judicious executive officer. In Ohio I have never heard the two Courts compared to the detriment of the Commission. It is sufficient, however, to say that the Constitution makes it concurrently with the Supreme Court, the Court of last resort in the State, and its decisions final as those of the Court itself.

There is one other point in Appellants' brief that

we have not touched upon in our original brief, that we wish to reply to.

On page 18 of their brief they say :

"It is scarcely possible that Hamilton was ignorant of the defaults in payment of interest of the mortgage bonds."

The only answer to such an assertion is the equally positive one that, it is highly improbable that Hamilton could know anything about it. He was a mechanic, not a bond broker, nor a capitalist ; his means of ascertaining such a fact were very limited, and there was nothing of a public nature to call his attention to it.

And on page 19, counsel farther say :

"In the first paragraph of his petition, Appellee Hamilton clearly admits his knowledge of the fact that mortgages and mortgage bonds were outstanding on the railroad and property when he made his contracts with the Toledo, Cincinnati and St. Louis Railroad Company for the erection of the dock. His petition contains this statement : 'Your petitioner further says that the labor performed and materials furnished by him, as set forth in said Exhibit A, thereto attached, was performed and used in permanently improving and rendering more valuable the property of the defendant, the Toledo, Cincinnati and St. Louis Railroad Company, mortgaged to secure the several series of bonds issued by said last named company and the several companies embodied in the said last named company by the consolidation fully set out in the several pleadings in this cause hereinbefore made.'"

While Hamilton may have had constructive knowledge of the existence of this mortgage when he made

his contract by reason of its public record, yet we feel safe in saying that as to actual knowledge of it, at this time, he had none, nor does his pleadings admit that he had any.

This language in the pleading, referred to, is the language of the pleader, and could not be construed as an admission on the part of Hamilton of knowledge. But construe it as strictly against him as possible, it is not an admission of knowledge at the time the contract was made, but at the time the pleading was prepared. And this was done, of course. after the suit was commenced, the bill of complaint filed, and a receiver appointed. At this time, Hamilton knew, of course, of the mortgage, and the default in the payment of interest, and knew it to his sorrow, but up to this time, it is not fair to presume that he had any actual knowledge.

Finally, on page 59, counsel say:

"If the railroad company never owned the two lots of land described by Hamilton in his alleged instrument of lien, Hamilton's entire claim must fail."

There was a dispute as to ownership between George W. Ballou and the railroad company in the Court below; but the decree, from which there was no appeal taken, found for the railroad company, and from the time of that decree the railroad company became the legal owner; before that, it had only an "unexecuted equity" in the land in question, as we have more fully argued in our original brief.

THE RAILROAD LIEN LAW.

We disagree entirely with appellants Counsel's interpretation of the Railroad lien law of Ohio. Since the decision in the Rutherford case, the legislature has declared it to be the policy of the State that a lien on a Railroad can be obtained by any contractor, material man or laborer who furnishes labor or material in such construction. Not only a lien but a superior lien to all others.

The original act was passed in 1874, vol. 71, Ohio laws, page 51. This act afterwards became sections 3207 to 3211 of the Revised Statutes. And the general Mechanics Lien Law as amended interpreted in the Rutherford case was passed in 1877. That case was decided in 1881, and the legislature of Ohio on the 6th of April, 1883, amended sections 3207 to 3211, 80 Ohio laws, pages 99, 100, 101 and 102.

By this amended act it was provided,

1st. By section 3207, that the contractor for the construction of a railroad, depot building, water tank, or any part thereof, shall be liable to and shall pay each person furnishing labor or material stipulated in the contract, under any contract with the contractor or sub-contractor for the whole or any part of the work stipulated in the original contract with the owner of the railroad. And the railroad company shall provide in any contract for such construction for payment, under the contract, in in the following order of priority :

1st. The persons performing labor or furnishing materials or board without preference.

2d. To any sub-contractor, the amouut due him after de-

ducting the amount which he is liable for, for material, labor or board.

3d. To any contractor or construction company intervening between the sub-contractor and the railroad company, upward to the owner of the railroad, any balance after the payments above provided.

Then section 3208 provides that any person who furnishes material or performs labor for or in construction of any railroad, depot building, water tank, or any part thereof, and any person furnishing board on the order of any contractor or sub-contractor, shall in addition to the protection provided for in section 3207, have a lien upon the railroad. This section is intended, not only to protect the material man, laborers and boarders, for the amount due them, but for the balance after paying the same, or if nothing is due thereon, for the contract price, to protect the contractor himself. The lien provided for in this section is not limited to the material man or laborers under contractors or sub-contractors. This is shown very clearly by a reading of the section and by reading section 3209 relating to the remedy in the enforcement of such suit. There was some ambiguity apparent in the section, although a careful reading of it would result in no other construction than the one we give, and the legislature, to remove any doubt upon the question, the following year, to-wit, April 10th, 1884, by act, gave it the interpretation which the legislature intended it should have, and that act is as follows :

AN ACT

To declare the true intent and meaning of an act entitled "An act to amend sections 3207, 3208, 3209, 3210 and 3211 of the revised statutes of Ohio," as amended April 6th, 1883.

Sec. 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO, That the true intent and meaning of sections thirty-two hundred and seven, thirty-two hundred and eight, thirty-two hundred and nine, thirty-two hundred and ten and thirty-two hundred and eleven of the revised statutes of Ohio, as amended April 6th, 1883, is hereby declared to be as follows: Any person or persons who perform labor, or furnish material or boarding, under contract, express or implied, with such railroad company, or any of its authorized agents, for the construction of such railroad, or any part thereof, is entitled to a lien for the payment of the same upon such railroad, as provided in section thirty-one hundred and eight of the recited act.

Sec. 2. This act shall be in force from and after its passage.

L. A. BRUNNER,
Speaker pro tem of the House of Representatives.

JOHN G. WARWICK,
President of the Senate.

Passed April 10, 1884.

Under this act, as thus interpreted, any person or persons, who perform labor or furnish material under any contract, express or implied, *with the railroad company or any of its authorized agents*, for the construction of the railroad, or any part thereof, is entitled to the lien provided in section 3208 of the Revised Statutes, as amended by the act aforesaid.

It is, therefore, the policy of the law of Ohio, as declared by statute, passed in 1883, before any of the work was done under the Hamilton contract, that such

a contractor as he, should have a lien upon the railroad, and superior to the liens, so far as the Legislature had the power to make it superior, of any other person.

It is not at all true, therefore, as counsel insists on page 29 of the printed brief, that this amendatory act applied only to sub-contractors and laborers under sub-contractors, but does apply to every contractor for the construction of a railroad or any part thereof. It is the policy of the act, however, as clearly defined in section 3207, that the principal contractor shall be postponed, for the payment of his claim, to the payment of the claims of sub-contractors and laborers and material men, and boarding house keepers, named in the section. Section 3207 insures to these material men, laborers, boarding house keepers, under the conditions named, a priority over the general contractor, but provides definitely for the payment of the general contractor after the other claims are paid. In the present case, as Hamilton has paid all of those men who would have a lien prior to him, no question of priority as between him and them could arise.

We have, then, in Ohio, a decision in the Lewton case of a right-of-way lien holder. While his lien attaches only to the land which he sold, yet he has a right to payment out of the proceeds of the entire road in preference to any other claim created by the railroad company.

The decision in the Rutherford case, that the general mechanic's lien law or builder's lien law, does not

in terms include the railroad, which is not "a lot of land" within the meaning of the statute, upon which the lien attaches.

And the decision in the Smith Bridge Company case, that the contractor for the construction of a bridge for a railroad company, as a part of the railroad, has a lien upon the bridge for the amount due him, which lien can be enforced by a sale of the entire railroad and a payment had out of the proceeds thereof.

Then we have by legislative enactment, an express statute, authorizing a lien upon a railroad, by every man connected with its construction up to the amount of the contract price of its construction, but with certain order of priority as between those engaged in its construction. And this is the law of Ohio, to-day, declared both by its Courts and by its Legislature.

Counsel insists that this law was never complied with by Hamilton, because the ten days notice required by the statute was not given. We insist that if the Court will examine the statute in connection with the original sections, 3207 to 3211, of which the act of April 6th, 1883, is amendatory, it will find that the notice which is to be given, is a notice not by the contractor, but by the person claiming under the contractor, and of whose claim the railroad would have no notice or knowledge except by the notice provided for in the section. It certainly was not contemplated by that act that the contractor, whose contract was a fixed price for a definite amount of work, should give a notice to the railroad company of the amount which he

claimed, or in the event of his failure to do so, that he should be held to have no claim against the company. It was perfectly a proper provision to require persons not in privity with the railroad, under this statute, and who were sub-contractors, or material men, or laborers, or boarding house keepers, and whose contracts were with the contractor or sub-contractors and not with the railroad company, should, if they claim a lien upon the railroad to the extent of the contract price or any part of it, give notice to the railroad company of the amount of such claim : or in the event of failure to do so, that the claim or rights given to them by this statute, should be held to be waived. But certainly the Legislature never intended that a contractor with the railroad, where the amount of the contract price and the work to be done was fixed in the contract itself, was required to give any such notice.

There is no claim that the affidavit was not filed and the lien perfected, even under this statute, within the forty days after the completion of the work. Of course, we are speaking now simply of this act of the legislature relating solely to railroads. The general Mechanic's Lien Law interpreted in the case of Bowman against the Smith Bridge Company, already cited, contains no requirement of any such notice. And while we insist that under the general Mechanic's Lien Law, as interpreted in that case, we have a perfect lien upon this property, we also insist that under an act of the Legislature passed in 1883, and before the work under this contract was done, that we are also protected by the lien therein authorized and provided for.

But we insist on this especially. That the authorities thus cited and the action of the Legislature thus given, shows it to be the policy of the State of Ohio, that men in Hamilton's position should be protected by a lien upon the property, no matter whether it is a dock or bridge, or the railroad bed and superstructure itself, and that no force can be given to the argument that the enforcement of such a lien is against the policy of the State. It is, on the contrary, in accord with it.

It must be remembered that at the time this statute was passed, the railroad company had not the title to these lands, although it claimed, at a later date, to have been the equitable owner thereof. That this was the law in force at the time the work was done under the contract. There is nothing to prevent the legislature from passing an act that would give to Hamilton, under an existing contract, a lien for the payment of the price thereof, which did not exist even at the time the contract was made. It adds nothing to, or deducts nothing from, the contract or the contract rights of the parties. It provides an additional remedy for enforcing the payment under the contract.

The reasons given by Counsel, therefore, on page 34 of brief, for not permitting mechanic's liens on railroads, does not exist in Ohio, as any part of this system. And what seems to be a strange system of law to Counsel, on the page aforesaid of their brief, is not only the law in Ohio, but practically the law to-day of a great many of the States of this Union.

The Supreme Court, in the case of the Smith Bridge Company against Bowman, have discussed this question of policy, and we cannot resist the temptation of printing here, at some length, from the opinion on that subject:

"We have been told that to place a lien upon railroad bridges would seriously interfere with the interests of traffic and trade; that it would be against public policy, as such action would impede the construction of railroads, and that such a lien would be difficult of enforcement. On account of these reasons it is said that the Legislature could not have intended to fix this lien upon this class of bridges. These are arguments proper for the Legislature to have considered prior to the act of 1874, and which it is presumed to have weighed. If the language used by the Legislature in a statute is precise and unambiguous, we conceive it to be our duty to interpret the words in their natural and ordinary sense, although the result may conflict with our ideas of public policy.

"The arguments which have been advanced, with force and skill, to exclude railroad bridges from the operation of this statute would apply with equal aptness to bridges owned by turnpike companies.

"A turnpike bridge is a part of an entire thing, to-wit: the public road, owned by the turnpike corporation. To subject such a bridge to mechanic's liens would seriously incommode the public and injure traffic and trade. Turnpike bridges belong to a distinctive class of bridges just as plainly as do railroad bridges. It makes a draft on one's credulity to believe that the Legislature, when it used the words 'any bridge,' intended to point out a turnpike bridge, but had no reference to a railroad bridge.

"Bridges constructed and owned in Ohio by corporations, organized for that sole purpose, invariably connect parts of a public highway. To subject them to a lien, to sell them and to take them away would seriously interfere with public interests.

"Exempt all these bridges from mechanic's liens and all in the way of bridges left to be affected by the statute would be bridges constructed by private persons upon their lands. These are few in number and of little value. We cannot believe that it was the intention of the legislature to give a mechanic's lien upon these alone.

"It has also been said that the reason why our statute does not extend mechanic's liens to railroad bridges, is that in the building of great and beneficent public works—such as railroads—such large sums of money are required that it is necessary to authorize the corporation building them, to mortgage their present and future to be acquired property, together with their franchises and income, in order to secure the means necessary to pay the contractors who are to be engaged in the work of construction; that if the lien of this mortgage was to be made subject to a lien by the contractors engaged in building bridges, it would be simply impossible ever to obtain the money to build a railroad, excepting through a capital stock ample for that purpose.

"It does not occur to us that this result would necessarily follow. In Ohio a railroad company is required to have a capital stock, and in most cases it is very large. A railroad company is also authorized to issue bonds and mortgage its property in an amount not exceeding the amount of its capital stock. If the capital stock usually subscribed before the work upon a railroad is commenced is actually paid, it would be sufficient to largely forward the work of construction when prudently expended. If this should be done and then a loan made upon mortgage bonds, money enough would be procured to easily complete the railroad and pay all engaged in its construction. The bond-holders would have behind them as security—

"1st. The work completed with the money procured by the stock subscription.

"2d. The work, rolling stock, equipment, etc., paid for with the money advanced upon their bonds.

"3d. The liability which our constitution and statutes attach to the holders of stock.

"Such is the theory of our law in regard to railroad building. The right of a mechanic or builder to have a lien upon a railroad bridge will not interfere with or embarrass companies, who propose to build railroads in this way. It may interfere with companies proposing to build railroads entirely upon borrowed money and without any paid up capital stock. If the giving of these liens will have a tendency to cause the theory of our statutes to be practiced, the statute giving the lien is in accord with sound public policy and is promotive of the value and permanency of railroad securities."

I also call the attention of the Court to the fact that the amended bill in this case, page 37 of the Record, alleges that this property taken in the name of George William Ballou, in equity, belong to The Toledo, Delphos and Burlington Railroad Company, and its successors The Toledo, Cincinnati and St. Louis Railroad Company. That the decree in the case, page 74 of the Record, finds it to be a part of the property of The Toledo, Cincinnati and St. Louis Railroad Company, and covered by the mortgage.

We have already shown, and it is established now by the Record, that this property was not purchased until after the Toledo, Delphos and Burlington Railroad Company, which made the mortgage which is claimed to be a prior lien on this property, went out of existence. That at the time of the purchase the railroad company which made the mortgage had no power to acquire any property. And that whatever may be the rights or equities between the railroad company which succeeds by consolidation and the holders of the bonds, certainly as between the bondholders and intervening legal lienholders, it could not be claimed that this property was covered by the first mortgage at all